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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 175

CONGRESS CONSTRUCTION CORP., *Petitioner*

v.

THE UNITED STATES

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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May 31, 1963

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CONGRESS CONSTRUCTION CORP., *Petitioner*

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THE UNITED STATES

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

Petitioner prays for a writ of certiorari to review the judgment of the United States Court of Claims dismissing its petition.

OPINION BELOW

The opinion and judgment of the Court of Claims is reported at 314 F. 2d 527 (1963). It is set out in Appendix A, *infra,* p. 1a to p. 10a.

JURISDICTION

The judgment of the Court of Claims (Opinion, Appendix A, *infra,* p. 10a) was entered on March 6, 1963. A petition for rehearing was not filed by petitioner and the time for filing such petition has expired. The jurisdiction of this Court is invoked under 28 U.S.C. (1958 ed.), Sec. 1255 (1)

QUESTION PRESENTED

Where an Act of Congress requires that, prior to acquisition by the United States of real property for the use of the Department of the Navy, the Secretary of the Navy "shall come into agreement" with the Committees on Armed Services of the Senate and the House of Representatives; and where the Secretary of the Navy, by contract with petitioner herein, agreed to seek approval of such Committees of a proposed real property acquisition, may an Assistant Secretary of Defense, without authorization by statute or by valid delegation from the Secretary of Defense, prohibit the Secretary of the Navy from carrying out such contract obligation and from performing the function vested in him by such Act of Congress, thereby precluding the Armed Services Committees from passing upon the real property acquisition without making the United States liable in damages to petitioner?

STATUTES INVOLVED

The pertinent provisions of the statutes involved are set out in Appendix B, *infra*. They are:

REAL PROPERTY TRANSACTIONS BY MILITARY DEPARTMENTS (Appendix B, *infra*, p. 27a), Act of September 28, 1951, Public Law 155, 82nd Congress, Ch. 434, Title VI, Sec. 601; 40 U.S.C. (1952 ed.) Ch. 11, Section 551.

MILITARY HOUSING INSURANCE, "WHERRY ACT" (Appendix B, *infra*, p. 27a), 12 U.S.C. (1952 ed.) Ch. 13, Subchapter VIII, Section 1748b, (b) (2).

NATIONAL SECURITY ACT AMENDMENTS OF 1949 (Appendix B, *infra*, p. 28a), 5 U.S.C. (1952 ed.) Ch. 2A, Section 171a (b), (c)(4) and (f); Section 171c (b); and Section 171z.

REORGNIZATION PLAN NO. 6 of 1953, effective June 30, 1953 (Appendix B, *infra*, p. 29a); 18 Federal Register 3743, 5 U.S.C. (1952 ed.) Section 133z, Supplement V, Vol. 1 at p. 56.

STATEMENT OF THE CASE

The facts are not in dispute. Findings of Fact are stated by the Court of Claims following the Opinion, Appendix A, *infra*, p. 10a to p. 26a. The essential facts are as follows:

Petitioner was the sponsor of a "Wherry" housing project for the construction and operation of a housing project for military personnel. The project never came to fruition solely because the Armed Services Committees of the House of Representatives and of the Senate did not pass upon and approve the proposed acquisition by the United States of the real property needed therefor. As sponsor, petitioner expended the sum of $220,467 in preparing the project and in the Court of Claims sought unsuccessfully to recover that sum. The amount thereof and the essentiality of the items which composed it were not disputed.

Jurisdiction of the Court of Claims was invoked under 28 U. S. Code (1958 ed.), Sec. 1491.

Approval by the Armed Services Committees of the House and Senate of a proposed purchase of land for a "Wherry housing" project was required by Section 601 of Public Law 155, of September 28, 1951. (Appendix B, *infra*, p. 27a). The pertinent part of Section 601 of Public Law 155 reads as follows:

> The Secretary of the Army, the Secretary of the Air Force, the Secretary of the Navy . . . or his designee, shall come into agreement with the Committee (sic) on Armed Services of the Senate and

> of the House of Representatives with respect to those real estate actions by or for the use of the military departments . . . that are described in subsections (a)-(e) of this section and in the manner therein described.
>
> (a) Acquisitions of real property where fee title is to be acquired for an amount estimated to be in excess of $25,000 . . .

The intervention of an Assistant Secretary of Defense prevented the proposed acquisition from even being considered by the Committees.

Early in 1950, the Department of the Navy invited proposals from contractors for the construction and operation of a large housing project for military personnel. The project was to be constructed and operated by the contractor selected and was to be privately financed by a mortgage loan insured by the Federal Housing Administration under the provisions of an addition (Appendix B, *infra*, p. 27a) to the National Housing Act. Petitioner was selected by the Department of the Navy as the contractor or "sponsor", and the Secretary of Defense authorized the Secretary of the Navy to negotiate directly with petitioner, and furnished the certificate to the Commissioner of the Federal Housing Administration required by statute (Appendix B, *infra*, p. 27a). See Defendant's Exhibit 7 (Appendix C, *infra*, p. 36a).

Negotiations between petitioner, the Department of the Navy and the Federal Housing Administration, as guarantor of the mortgage loan, continued for over two years. Late in June of 1953, the Navy came into agreement with petitioner on the essential terms involved in the project (Opinion, Appendix A, *infra*, p. 3a and p. 5a). These included certain land for the site owned by petitioners. The only thing remaining to be done

was for the Secretary of the Navy, or his designee, to present the proposed real property acquisition to the Armed Services Committees and to secure their approval. Implicit in the arrangements with petitioner was the Navy's undertaking to present such proposed land acquisition to the Committees and to urge approval thereof.[1]

It was understood at all times by petitioner and the Department of the Navy that the purchase of the land by the United States and the subsequent construction of the project itself was contingent upon approval of the real property acquisition by the Armed Services Committees of the House and Senate. The court below refers to this condition precedent as "an indispensable pre-condition to the consummation of the project." (Opinion, Appendix A, *infra*, p. 3a).

Late in July 1953 the representative of the Secretary of the Navy submitted to each of the Armed Services Committees an application for approval of the acquisition of the land. A preliminary hearing was held by a Subcommittee of the House Committee. It adjourned without action on the application. No hearing was ever held by the Senate Committee. Aside from this preliminary hearing by the House Subcommittee, no further hearings were ever held. This result was the direct consequence of action taken by the Assistant Secretary of Defense for Properties and Installations. In September 1953, this Assistant Secretary notified the service secretaries that he "requested" all proposed purchases of land within the

[1] The lower court stated: "We pass over this issue, assuming *arguendo* that the Navy was legally bound to plaintiff to make a good faith attempt to persuade the Committees, once plaintiff and the Navy had come to terms." (Appendix A, p. 5a).

scope of Public Law 155 sec. 601, to be forwarded to his office for prior clearance. (Defendant's Exhibit 49; Appendix C, *infra*, p. 31a).

The petitioner was not advised of this requirement of the Assistant Secretary until long after agreement with the Navy on the terms of the contract had been reached. (Finding 11, Appendix A, *infra*, p. 15a). It was not published in the Federal Register.

For some eight years prior to the matters considered here, the established procedure of the Department of the Navy for acquisition of real estate was to obtain the approval of the Congressional Naval Affairs Committees. (Finding 11, Appendix A, *infra*, p. 14a). No Department of Defense approval had ever been required.

The Department of the Navy endeavored to comply with this new requirement and to get permission from the Assistant Secretary of Defense to submit the proposed acquisition to the Armed Services Committees, all without success. As a consequence, the Department of the Navy was obliged to withdraw consideration of the proposed acquisition of land from both Committees without having had an opportunity to recommend approval and without permitting the Armed Services Committees even to consider the matter.

We believe the action of the Assistant Secretary of Defense was unlawful and constituted a breach of the contract between the United States and petitioner for the construction of the housing project, one essential element of which was the Navy's undertaking to submit the proposed acquisition to the Armed Services Committees and to urge approval thereof. The question is not here presented as to the power of the Secre-

tary of Defense himself to have intervened for it was not the Secretary, but an Assistant Secretary, who intervened.

The lower court undertook to justify this high-handed action of the Assistant Secretary by attempting to establish that lawful authority passed from the Secretary of Defense to the Assistant Secretary (Properties and Installations).

A summary of the statutory powers of the Secretary of Defense follows, from which it will be seen that the Assistant Secretary's action was unlawful.

The National Security Act Amendments of 1949 (Appendix B, *infra*, p. 28a) undoubtedly placed the administration of the Department of the Navy in the hands of the Secretary of the Navy but under the direction, authority and control of the Secretary of Defense. The latter was authorized to delegate any function vested in him to such officials of the Department of Defense as he might designate. Included among such officials were the three (later six additional) Assistant Secretaries of Defense. The Assistant Secretaries were to perform such duties and exercise such powers as the Secretary of Defense might prescribe. The Assistant Secretaries had no authority except as delegated to them by the Secretary of Defense.

The statute further provided that the Secretary of Defense shall maintain direct surveillance over the planning and construction by the military departments of all "public works", such surveillance to be maintained by the Director of Installations. (Appendix B, *infra*, p. 29a). The latter's duty was to report from time to time to the Secretary of Defense with respect to public works projects under construction by the

military departments and to keep the Secretary of Defense fully informed. The Director of Installations was given no authority whatever to issue orders to the Secretary of the Navy, change procedures for real property acquisitions or interfere with the statutory duties of the Secretary of the Navy or of the Armed Services Committees under Public Law 155, sec. 601. Nor did the Director of Installations attempt to do so.

Reorganization Plan No. 6, effective June 30, 1953 (Appendix B, *infra*, p. 29a) transferred the functions of the Director of Installations to the Secretary of Defense. It provided for six additional Assistant Secretaries of Defense to perform such functions as the Secretary of Defense might prescribe. It further provided that the Secretary of Defense might authorize the performance by any officer of the Department of Defense of any of his functions, including any function transferred to the Secretary of Defense by Reorganization Plan No. 6.

The foregoing reference to the statutory duties and powers of the Director of Installations discloses that he had only limited functions of surveillance and reporting. In its Opinion, the lower court states that "the Secretary passed these powers on to the Assistant Secretary for Properties and Installations." (Appendix A, *infra*, p. 8a). The lower court does not disclose the basis for its conclusion.

A search of the Record below produces but one document bearing upon the authority of the Assistant Secretary of Defense in 1952-1953, namely, Defendant's Exhibit 96 (Appendix C, *infra*, p. 33a).

Defendant's Exhibit 96 was designated "Department of Defense Directive", dated August 13, 1953

and was entitled "Responsibilities of the Assistant Secretary of Defense (Properties and Intsallations)." It was issued by the Secretary of Defense pursuant to the National Security Act of 1947, as amended, and Reorganization Plan No. 6 of 1953. It enumerated the Assistant Secretary's "responsibilities". These included, *inter alia*, developing policies and procedures in the broad field of real estate acquisition and family housing; developing uniform plans and policies in the provision and administration of family housing for the services; and standards and cost criteria for family housing and reporting from time to time to the Secretary of Defense. Defendant's Exhibit 96 then provided:

> Directives recommended by the Assistant Secretary of Defense (Properties and Installations) *which intend to change established policies or procedures will be signed by the Secretary or Deputy Secretary of Defense* . . . (Emphasis supplied).

This Department of Defense Directive (Defendant's Exhibit 96) was not published in the Federal Register.[2]

It is apparent from the foregoing that the action of the Assistant Secretary of Defense in insisting upon "clearance" by his office of proposed land acquisitions changed an established policy and a recognized procedure in the Department of the Navy. It could not have been valid without the signature of the Secretary or the Deputy Secretary of Defense. Defendant's Exhibit 96 did indeed pass the powers of the former Di-

[2] On March 8, 1954, a "Department of Defense Instruction" (Defendant's Exhibit 66, Certified Record; not printed in Appendix C) provided *inter alia* that "no real property action will be submitted to the Committees without the approval of this office." This was not published in the Federal Register.

rector of Installations to the Assistant Secretary of Defense, but *it did not lodge in the Assistant Secretary of Defense any power or authority to take the action complained of.*

It is clear that, wholly aside from any question of contract law, the decision of the lower court puts any person contracting with the Department of Defense under a new and intolerable burden. This is so because, after reaching agreement with the Navy official held out to him as the duly designated contracting officer, such person must nevertheless ascertain, at his peril, that the Secretary of Defense personally, or some other official superior to the contracting officer, has approved or will approve the agreement, even though the contractor has neither actual notice nor constructive notice (by publication in the Federal Register) of this requirement. We believe that the lower court erred in so deciding and that such error will disrupt the orderly, established procurement practices not only of the Department of Defense but of all other executive departments and independent agencies. We believe, in addition, that the lower court erred in holding that a contract entered into by an authorized official may be nullified, without liability for damages, by subsequent acts of a superior official, which are not acts of sovereignty. We believe that these errors of the lower court present questions of sufficient importance to call for the exercise of this Court's supervisory power.

REASONS FOR GRANTING THE WRIT

1. As we have pointed out, Public Law 155, Section 601 (Appendix B, *infra*, p. 27a) reposed in the Armed Services Committees the function of "coming into

agreement" with the Secretary of the Navy in respect of proposed real property acquisitions for the use of the Department of the Navy. Congress obviously decided to supervise these purchases through these Committees. But the lower court approved the exercise of this Congressional function by the Assistant Secretary of Defense and placed its sanction on his unlawful action. The Assistant Secretary of Defense could properly, through the Secretary of the Navy, have made known his views to the Committees. Instead, he arrogated the statutory function of the Committees to himself in derogation of Public Law 155. He encroached upon the legislative prerogative of the Congress, in whom alone reposed the power to make laws necessary to carry out its Constitutional powers, as expressed in Article 1, and Article 1, Section 8, Clause 18 of the Constitution.

It is, of course, basic that neither administrative officers of a department, nor the courts, may supply omissions or enlarge the scope of an Act of Congress. *Busey, Collector* v. *Deshler Hotel Co.*, 130 F. 2d 187, 190, CCA 6 (1942), citing *Iselin* v. *United States*, 270 U.S. 245. Even where a regulation is relied upon, if the regulation goes beyond the statute it is void, for the scope of Congressional enactment cannot be enlarged by a departmental regulation. *Commissioner of Internal Revenue* v. *Betts*, 123 F. 2d 534, 540, CCA 7 (1941). *A fortiori*, by the naked order of a Department official in contravention of the statute. It is the statute which finally governs. *Technicolor Motion Picture Corp.* v. *Westover*, 202 F. 2d 224, 227, CCA 9 (1953), citing *Royal Indemnity Co.* v. *United States*, 313 U.S. 289. The power to alter or repeal laws is a legislative power and executive officers may not by

means of rules and regulations, orders, or otherwise, extend, alter or disregard laws enacted by the legislature. *Peony Park Inc.* v. *O'Malley, Collector,* 121 F. Supp. 690, 695, D. C. Neb. (1954), aff. 223 F. 2d 668, CCA 8 (1955), cert. denied 350 U.S. 845.

The action of the Assistant Secretary of Defense resulted in the destruction of petitioner's contract rights. Such action was *not* an exercise of sovereignty but an act without justification in statute, administrative discretion or otherwise. In earlier decisions the Court of Claims has approved the principal that under these circumstances the mantle of sovereignty does not give the United States immunity from suit. *Ottinger* v. *United States,* 88 F. Supp. 881, 883, Court of Claims (1950)[3]; *Froemming Bros., Inc.* v. *United States,* 70 F. Supp. 126, Court of Claims (1947). Nor does it in the case at bar.

2. No citation of authority is necessary to establish that when a contracting officer of the United States (here the Chief of the Bureau of Yards and Docks of the Department of the Navy) has been delegated authority by the Secretary of the Navy to enter into a contract on behalf of the United States and does so, the United States is not relieved of its obligations under that contract if the Secretary of the Navy, the Secretary of Defense or even the President of the United States makes a subsequent determination that the Government shall not fulfill its obligations there-

[3] The case was first heard by the Court of Claims on demurrer to the petition. The demurrer was overruled, 88 F. Supp. 881. At the trial on the merits, the court, while approving the language it had used regarding sovereign acts of the Government, found that the facts showed that the Government acted in a sovereign capacity, and dismissed the petition, 106 F. Supp. 198.

under. In the case at bar, the Chief of the Bureau of Yards and Docks, pursuant to delegated authority, had entered into a contract with petitioner, subject to a condition precedent (approval of the Armed Services Committees). The terms of that contract required the United States to try to bring about the happening of such condition. The subsequent determination by an Assistant Secretary of Defense that the United States should not honor its obligation to try to bring about the happening of such condition no more relieved the United States of liability for breach than would have been the case had a breach of a simple bilateral agreement been involved. Contract obligations entered into by an authorized contracting officer of the United States within the scope of his authority may not be abrogated by a superior officer without subjecting the United States to damages for breach of contract.

3. The record establishes that the United States failed to fulfill its obligation to petitioner to seek approval of the Armed Services Committees for the acquisition of petitioner's land. Such obligation constituted a condition precedent to the finalization of the contract between the parties. There can be no question that when one party to a contract obligates himself to do all he can to bring about the happening of a condition, and then fails to do so, he cannot take advantage of such failure and ". . . any conditions which the facts show might have been performed . . . will be assumed would have been performed if the conduct of the promisor was such as to preclude the possibility of performance . . ." *Williston on Contracts*, Section 677, (Rev. Ed. 1936). See also *Wissahickon Realty Corp.* v. *Boyle*, 358 Pa. 198, 122 A.2d 720. The fact that an

Assistant Secretary of Defense prohibited the Secretary of the Navy from making a submission to the Armed Services Committees did not determine whether or not the Armed Services Committees would have approved the acquisition of the land. The opinion of such Assistant Secretary was no substitute for the action of the Committees. It follows that withdrawal of the acquisition application from Committees' consideration did not relieve the Government of the obligation to seek the Committees' approval nor did it, as the court below held, relieve the Government of liability for damages for breach of contract.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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May 31, 1963.

APPENDICES

APPENDIX A—Opinion, Findings, Conclusion of Law and Judgment

APPENDIX B—Pertinent Provisions of Statutes Involved

APPENDIX C—Defendant's Exhibits 49, 96
Plaintiff's Exhibit 7

APPENDIX A

IN THE UNITED STATES COURT OF CLAIMS

No. 535-59

(Decided March 6, 1963)

CONGRESS CONSTRUCTION CORPORATION

v.

THE UNITED STATES

John T. Koehler for the plaintiff. *John Paulding Brown, John Geyer Tausig, and Butler, Koehler & Tausig* were on the briefs.

Herbert Pittle, with whom was *Assistant Attorney General Ramsey Clark*, for the defendant.

Before JONES, *Chief Judge*; WHITAKER, *Judge*; LARAMORE, *Judge*; DURFEE, *Judge*; and DAVIS, *Judge*.

Opinion

DAVIS, Judge, delivered the opinion of the court:

Plaintiff was the potential sponsor of a "Wherry Housing Project" which never came to fruition because the Armed Services Committees of the Congress did not approve the acquisition by the Government of the land needed for the project. As such sponsor, plaintiff expended about $220,500 in preparation, and now seeks to recover that sum on the ground that the defendant failed to use its best efforts to obtain the required Congressional approval.

As the court has already pointed out (*Henry Barracks Housing Corp. v. United States*, Ct. Cl. No. 524-58, decided July 15, 1960, slip op. 3, 281 F. 2d 196, 197-98), the Wherry Military Housing Act—Title VIII of the National Housing Act, as added by 63 Stat. 570 (see also 64 Stat. 97, 65 Stat. 365); 12 U.S.C. (1952 ed.) § 1701, *et seq.*—was enacted to encourage private investors to engage in the construction of

rental housing for military and civilian personnel on duty at military installations. The legislation sought to remove the unattractive features of private investment in military housing through (i) a special form of mortgage insurance up to 90 percent of replacement cost; (ii) acquisition by the Government of the building sites, followed by a long-term irrevocable lease to the builder; and (iii) assurance that utilities would be provided the project on a long-term basis by the nearby military post. The sticking point in this case, as we shall see, was the acquistion by the Government of the project land for, under a general provision which Congress has long kept in effect, the military departments must "come into agreement" with the Armed Services Committees of the Congress before making fee-title acquistion of real property costing over a stated sum.[1]

This abortive Wherry Housing Project had its origin in 1950, when the Navy requested various builders to submit proposals for the housing of naval personnel in the Alameda-Oakland area of California. In the spring of 1952, the Navy determined that a tract owned by plaintiff[2] offered the best possibilities, and by the end of July, 1952 authoriza-

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[1] The Act of September 28, 1951, Chapter 434, Title XI, Sec. 60; 65 Stat. 366, 65 Stat. 365, 40 U.S.C. (1952 ed.) § 551, formalized this requirement as follows:

"The Secretary of the Army, the Secretary of the Air Force, the Secretary of the Navy, . . . as the case may be, or his designee, shall come into agreement with the Committee on Armed Services of the Senate and of the House of Representatives with respect to those real estate actions by or for the use of the military departments . . . that are described in subsections (a) through (e) below, and in the manner therein described:

(a) *Acquisition:*

Acquistions of real property where fee title is to be acquired for an amount estimated to be in excess of $25,000 . . .".

[2] For convenience, we shall refer only to plaintiff, although certain of the transactions were carried on by plaintiff's corporate subsidiaries or the individual who controlled plaintiff.

tion was given the local naval official to negotiate with with plaintiff for a 500-unit Wherry housing project on this land (which the Government would purchase). During the latter part of 1952, as part of these negotiations, plaintiff submitted to the Navy and the Federal Housing Administration (which had to approve the project if mortgage insurance were to be given) plot plans and building layouts. These were tentatively approved, and plaintiff's formal proposal was made to the Navy on December 10, 1952. After some modifications, the Navy informed plaintiff at the end of February 1953 that the proposal was "generally acceptable." At the end of May 1953 the Navy gave plaintiff the required "Certification of Need" which was a prerequisite to financing through F.H.A.; this certification was made contingent on Navy ownership of the site (which was to be acquired from plaintiff) and it was pointed out that Congressional clearance would be needed for the acquisition: the plaintiff was told that if it chose to go ahead with F.H.A. financing "you must assume the risk of the Navy obtaining favorable action by Congressional Committees for acquisition of the site." By the end of June 1953, the F.H.A. agreed to insure the mortgage on the project if it should ultimately be under taken.

Both plaintiff and the Navy understood all the while that an indispensable pre-condition to the consummation of the project was the approval by the Senate and House Armed Services Committees of the purchase of the land from the plaintiff. The Navy came into agreement on terms with plaintiff and prepared the data necessary to obtain the Congressional consent, but it was always clear to both parties that the purchase and the project each hinged on Congressional approval of the land acquisition. The Navy told plaintiff that it "cannot officially accept your offer [relating to the land] nor commit the Navy in any way to such acceptance until the land is approved for acquisition by Congressional Committees"; on the Navy's insistence,

plaintiff revised its offer relating to the land so that it was explicitly made subject to the Committees' agreement.

On July 29, 1953, the Navy submitted this land acquisition proposal to the Assistant Secretary of Defense for approval; two days later, on July 31st, the Navy forwarded it to both the Senate and the House Committees. Until early 1953, it had been the Navy's practice to submit its real estate transactions directly to the Congressional Committees, without clearing through the Department of Defense. Late in 1952 or early in 1953, however, a director of Installations and Logistics (later the Assistant Secretary of Defense for Properties and Installations) was established in the Office of the Secretary of Defense to review all construction projects and property acquisitions (see footnote 6, *infra*). In February 1953 the Senate Committee informed the Defense Department that it desired that all future requests for committee approval should indicate the concurrence of the Secretary of Defense. Thereafter, the Navy submitted all pending and all new projects to the Secretary. It was pursuant to this changed practice that the Navy forwarded to the Defense Department (in July 1953) the acquisition in which plaintiff was interested. Early in September 1953, the Assistant Secretary of Defense formally required the Navy to submit to him for prior clearance all real estate transactions which had to go to the Congressional Committees.

The gist of the subsequent history is that, despite a full-scale effort by the Navy to convince him,[3] the Assistant Secretary of Defense would not approve the acquisition from plaintiff of the site necessary for the housing project. This led to a checkmate since the Congressional Committees would not proceed to final consideration of the purchase in the absence of further stimulation by the Navy, and the Navy felt itself precluded from urging acceptance upon the

[3] Plaintiff concedes that the Navy used its best efforts to obtain the approval of the Department of Defense.

Committees until it had obtained clearance from the Defense Department. Ultimately, when it became clear that this higher-echelon approval would not be forthcoming, the Navy formally requested the Committees to permit withdrawal of the proposal (in April 1954). The result was that the entire Wherry Housing Project, of which the land acquistion was an inseparable part, failed to come to life.

Recognizing that the purchase of the land was always contingent upon approval by the Congressional Committees, plaintiff does not assert that the mere failure of the Committees to approve the transaction gave rise to any liability on the Government's part. The primary claim is, rather, that the Navy obligated itself to plaintiff to use its best efforts to obtain such approval, and broke that promise by not going forward before the Committees even though the Defense Department withheld its consent.

At the outset, there is a substantial question, which we leave undecided, whether the Navy *obligated* itself to do anything toward bringing the negotiations to completion. It is clear that there was a coming-together of the Navy and plaintiff on the terms and scope of the proposal, but though it was expected that the Navy would present the matter to the Committees no such express undertaking was given. Perhaps a subsidiary agreement to press further in good faith can be implied, but on the other hand it may be that no legal rights at all,—no binding agreement of any kind—would arise until final acceptance by the Committees (see *Kilmer Village Corp.* v. *United States*, 139 Ct. Cl. 231, 234-235, 236, 153 F. Supp. 393, 396, 397 (1957)).[4] We pass over this issue, assuming *arguendo* that the Navy was legally bound to plaintiff to make a good faith attempt to persuade the Committees, once plaintiff and the Navy had come to terms.

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[4] See also, *Carmick* v. *United States*, 2 Ct. Cl. 126, 135 (1866); *Darragh* v. *United States*, 33 Ct. Cl. 377, 391 (1898); *Cathell* v. *United States*, 46 Ct. Cl. 368, 371 (1911).

Was this obligation breached because the Navy, bowing to the will of the Defense Department, did not urge approval by the Committees? The plaintiff says that the Defense Department encroached onto an area which, by statute and practice, was solely the Navy's, and therefore that the Navy had no legal excuse to submit. It is true that the negotiations were carried on by (or on behalf of) the Secretary of the Navy and that the statute forbidding Navy land acquisition without Congressional consent (see footnote 1, *supra*) speaks of the Navy's Secretary coming into agreement with the Committees, without mentioning the Secretary of Defense. But when purely executive functions of a discretionary nature are imposed on a subordinate official of the Government it is an implied condition that his actions (before they have become final) are subject to the review and supervision of his superiors—if the superior is authorized to intervene in that particular field and does so in time. Cf. *Darragh* v. *United States*, 33 Ct. Cl. 377, 392 (1898). So far as the Presidency is concerned, this is a necessary corollary of *Myers* v. *United States*, 272 U.S. 52, 163-164 (1926), holding that Article II of the Constitution "grants to the President the executive power of the Government, i.e., *the general administrative control of those executing the laws*, including the power of appointment and removal of executive officers * * *" (emphasis added). Cf. *Humphrey's Executor* v. *United States*, 295 U.S. 602, 627-628 (1935); *Wiener* v. *United States*, 357 U.S. 349, 351 (1958).[5] If the acquisition of plaintiff's land had somehow been called to the President's attention, he would clearly have been within his power in directing the Secretary of the Navy not to seek acceptance of the transaction by the Congressional Committees. Although the statute does not refer to the Presi-

[5] See, also, *Marbury* v. *Madison*, 1 Cranch 137, 166 (1803); *Wilcox* v. *Jackson*, 13 Pet. 498, 513 (1839); *United States* v. *Jones*, 18 How. 92, 95 (1856); *Runkle* v. *United States*, 122 U.S. 543, 557 (1887).

dent in terms, it is implicit in the legislation that he can direct the actions of his subordinate, whom Congress named; "the Secretary of the Navy represents the president, and exercises his power on the subjects confined to his department" (*United States* v. *Jones*, 18 How. 92, 95 (1856).

We think that in the circumstances of this case the Secretary of Defense had like authority. By June 1953 Congress had given the Defense Department sufficient power over the Navy so that it had the status of a full superior for the matters with which we are concerned. The Department of Defense had been established as an "Executive Department of the Government" and the Army, Navy, and Air Force as "military departments" "within" it. The Secretary of Defense was designated "the principal assistant to the President in all matters relating to the Department of Defense"; under the President's direction, and subject to certain restrictions (not now pertinent), "he shall have direction, authority, and control over the Department of Defense." The military departments were to be separately administered by their respective Secretaries, but "under the direction, authority, and control of the Secretary of Defense." Specially detailed provisions were made for Defense Department supervision and control over the budgetary and fiscal procedures and policies of the military departments. See Act of August 10, 1949, 63 Stat. 578, 5 U.S.C. § 171, *et seq.*

This broad range of statutory authority over the Navy would doubtless have been effective, in itself, to empower the Secretary of Defense (acting through his subordinates, as the law permitted him to do, 5 U.S.C. § 171a(f)) to review the Navy's acquisition of land for a Wherry Act project. But there was even more specific statutory delegation of power. A 1951 addendum to the Wherry Act (65 Stat. 365, 12 U.S.C. (1952 ed.) § 1748i), authorizing funds for land acquisitions for Wherry Act housing projects, expressly provided that "such funds may be expended

by the respective military departments for housing projects when the Secretary of Defense, after consultation with the Federal Housing Commissioner, determines that such housing projects should be constructed and that such expenditures are essential to the construction of satisfactory housing." In addition, as we have indicated, a Director of Installations was established in 1952-1953 in the office of the Secretary of Defense to oversee all construction projects and land acquisitions.[6] By Reorganization Plan No. 6 of 1953, effective June 30, 1953, 67 Stat. 638—which had the status of legislation—the functions of the Director were transferred to the Secretary of Defense, who was also authorized to delegate the functions to an Assistant Secretary; the Secretary passed these powers on to the Assistant Secretary for Properties and Installations.

In sum, the Department of Defense was endowed with undeniable supervisory control, general and specific, over the proposed purchase of land from plaintiff. The Assistant Secretary was not an interloper, nor did he trespass on the Navy's authority when he insisted on his right to approve the transaction. And under its authority the Defense Department was not limited to passing upon the need for the housing project, as plaintiff asserts, but could properly consider any and all factors, including the price to be paid for the land. As shown by both its general and its specific grants of authority, the Department had the full scope of a superior officer in the direct chain of command.

Since the Defense Department acted lawfully in taking cognizance of this proposed land acquisition, plaintiff is forced to contend that the Navy was nevertheless obligated

[6] This office was created by the Act of July 14, 1952 (Public Law 534), 66 Stat. 606, 625, which directed the Secretary of Defense to "maintain direct surveillance over the planning and construction by the military departments of all public works projects."

(by its assumed arrangement with plaintiff) to pursue the matter before the Congressional Committees. This cannot be. To interpret the Navy's implicit agreement to use its best efforts to obtain Committee approval as binding it to by-pass or overrule its superior would contravene a basic canon of proper public administration, acknowledged throughout the nation's history. Subordinates do sometimes seek to undermine their chiefs via the back-door, but it is hard to believe that an official would undertake to do so by a contract obligating the United States, or that such an agreement, if made, would be within the official's power. After the Defense Department took hold of the matter and indicated that its prior clearance was necessary before submission to the Congress, no Navy official could reasonably have been expected to appear before or press for action by either Committee.[7] That would be stark insubordination. We cannot construe the Navy's promise to use its best efforts to obtain Congressional approval—which we have assumed for this case—to include such unreasonable and improper conduct. It may well be that neither the Navy nor plaintiff foresaw the dominant role taken by the Secretary of Defense, but they must be held to have contracted in the light of that eventuality—foreshadowed by legislation then on the books.

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[7] Plaintiff does not rely on the provision of the act establishing the Defense Department which declares that "no provision of this Act shall be so construed as to prevent a Secretary of a military department or a member of the Joint Chiefs of Staff from presenting to the Congress, on his own initiative, after first so informing the Secretary of Defense, any recommendations relating to the Department of Defense that he may deem proper." 5 U.S.C. § 171a(e)(8) (formerly 5 U.S.C. § 171a(e)(6)). This section, obviously intended for important matters of policy, was not designed to encourage the military departments to "appeal" any decision of the Defense Department, no matter how minor, to the Congress. The Navy's agreement to use its best efforts would not include a promise to use the extraordinary avenue of communication opened by this section.

Plaintiff urges, alternatively, that the Navy Department undertook to vouch for the best efforts of the entire Executive Branch, not of the Navy alone. We find nothing, however, in the negotiations between plaintiff and the Navy to suggest that the latter agreed to bind the Defense Department or the President. Both parties appear to have left those superiors entirely out of consideration; at most, the Navy agreed to put forth its own best efforts. Even if the Navy did seek (in advance of the Defense Department's apprising itself of the facts) to constrain the latter to persuade the Committees, we know of no authority by which a subordinate official can bind a superior, who has not yet considered a matter which he has a right to see before final action, to take a certain position. That would turn the administrative hierarchy upside-down.

The plaintiff has not shown that any obligation to it undertaken by the defendant has been breached. Its expenditure of funds in anticipation of the final contract does not change the result. "It is probably the rule rather than the exception that money is spent and not recovered in circumstances where a contract is not consummated." *Kilmer Village Corp.* v. *United States*, 139 Ct. Cl. 231, 236, 153 F. Supp. 393, 397 (1957); see also *Abbell* v. *United States*, 143 Ct. Cl. 556, 561, 166 F. Supp. 602, 606 (1958); *Carmick* v. *United States*, 2 Ct. Cl. 126, 135 (1866).

Plaintiff is not entitled to recover. The petition will be dismissed.

Findings of Fact

The court, having considered the evidence, the report of Trial Commissioner Roald A. Hogenson, and the briefs and arguments of counsel, makes findings of fact as follows:

1. Plaintiff is a Delaware corporation with its principal place of business at New York City. Since 1950, 30 percent of plaintiff's stock has been owned by Edmond C. O'Dris-

coll, 30 percent by O'Driscoll Corp., and 40 percent by George E. Stone, deceased.

All of the common stock of O'Driscoll Corp. is and was owned by Mr. O'Driscoll.

2. During the years 1950 to 1954, Alameda Bayside Construction Corp., Alameda Bayside Development Corp. I, and Alameda Bayside Land Corp., were wholly owned subsidiaries of the plaintiff corporation. The Alameda corporations were dissolved in 1959 and their assets were transferred to plaintiff.

3. In 1950, the Department of the Navy made a preliminary determination to certify construction of a 700-unit housing project under Title VIII of the National Housing Act for military personnel of the naval installations in the Alameda-Oakland area of California. On February 16, 1950, the Department of the Navy circulated a questionnaire to builder-operators advising them of such preliminary determination and inviting them to submit proposals and statements of their qualifications and experience in the construction industry, particularly with reference to the construction and operation of large multiple-unit housing projects. In that questionnaire the statement was made that the information requested by the Navy at that time was required only to enable it to determine whether builder-operators were properly qualified for the construction and operation of housing projects and that the Department reserved the right to select one or more of the applicants for a proposed project with or without further negotiation. The Department also reserved the right to reject any or all submittals.

4. During the year 1950, Edmond C. O'Driscoll acquired 40 acres of land in Alameda, California. He took title to 30 acres in his own name and title to 10 acres in the name of Alameda Bayside Land Corp. He paid approximately $50,000 provided by plaintiff for the entire tract. Most of

the tract was tideland, only 5 to 10 percent never being under water, with some always being under water, and some inundated during flood tide.

Mr. O'Driscoll held title to the 30 acres in his own name for convenience and was prepared to transfer such title to whichever corporation might be named as mortgagor to complete the necessary transactions in the event negotiations with the defendant culminated in agreement for construction and operation of the proposed Navy housing project on the tract. Mr. O'Driscoll did not enter into any agreement to transfer title to the 30 acres but retained such title until he transferred it to plaintiff in 1958.

The 19.2 acres of land, hereinafter mentioned in these findings, were part of the 30 acres owned by Mr. O'Driscoll.

5. In response to the questionnaire which it had circulated, the Department of the Navy received proposals from several contractors for the construction of the rental housing. Having acquired the 40 acres of land referred to, Mr. O'Driscoll responded to the questionnaire and through the plaintiff submitted a proposal in the summer of 1951 for the proposed housing project. The proposal submitted by the plaintiff at that time was rejected because it was determined that the Navy could not negotiate with a single sponsor who was the owner of the property and that the rentals proposed to be charged for the housing to be constructed were in excess of those which military personnel could pay. In addition, legislation was being considered at that time to subsidize housing projects under Title VIII of the National Housing Act of June 27, 1934, as amended August 8, 1949, and May 2, 1950, 63 Stat. 570, 64 Stat. 97.

6. As a result of discussions and further negotiations, the above-mentioned Alameda Bayside Construction Corp., hereafter referred to as Alameda, submitted a formal proposal dated December 10, 1952, to the Department of the Navy for construction and operation of a housing

project. Prior thereto, representatives of the Department of the Navy had determined that the tract which they believed was owned by Alameda offered the most desirable site and was considered feasible for the Title VIII housing project. Accordingly, by memorandum dated March 31, 1952, Captain H. F. Ransford, District Public Works Officer, Twelfth Naval District, hereinafter referred to as DPWO, requested the Chief of the Bureau of Yards and Dock to authorize the DPWO to commence negotiations with Alameda for the construction of a 500-unit Title VIII project.

7. By memorandum dated May 2, 1952, the Chief of the Bureau of Yards and Docks recommended that the Chief of Naval Operations obtain approval from the Secretary of Defense for the Bureau of Yards and Docks to enter into negotiations with Alameda, as requested by the DPWO.

8. By memorandum dated July 25, 1952, the Under Secretary of the Navy requested Mr. Thomas Coogan, Director, Armed Forces Housing Agency, an office established in the office of the Secretary of Defense, for approval to negotiate directly with Alameda for the development of 500 units of Title VIII housing.

9. By memorandum dated July 31, 1952, Mr. Coogan granted approval to negotiate the project. Thereafter, negotiations continued throughout 1952.

10. During the negotiations in 1952, plot plant and building interior layouts were submitted to the Department of the Navy and to the Federal Housing Administration and were considered by the DPWO to be sufficiently detailed for the Navy to determine whether a satisfactory project could be developed within Navy-approved rentals and within the appropriations for assistance not to exceed $500,000 for land acquisition and for construction of utilities. Such tentative drawings were approved by the San Francisco office of the Federal Housing Administration

subject to development of working drawings to be revised in such details as might be required to embody all currently effective FHA minimum property requirements. A copy of this stated position of the FHA was provided to Alameda by the DPWO in his transmittal letter dated October 31, 1952, in which Alameda was advised that such tentative plans were acceptable for developement of the project.

Proposals under consideration contemplated a Title VIII military housing project constructed with private capital and operated by private owners, financed by a mortgage loan insured by the Federal Housing Administration. This type of Title VIII housing generally referred to as Wherry housing, also contemplated the purchase of the site by the Government, after which the builder-operator would be obligated to lease the land and improvements for a long term and operate the project in accordance with contractual and statutory provisions.

11. From about 1943 until the act of September 28, 1951, 65 Stat. 365, the procedure followed by the Navy for acquisition of real estate for construction of real estate projects was to obtain the approval of the Congressional Naval Affairs Committees for such proposed projects.

Section 601 of the act of September 28, 1951, provides that the Secretary of the Army, the Secretary of the Air Force or the Secretary of the Navy, as the case might be, or his designee, "shall come into agreement with the Committee on Armed Services of the Senate and of the House of Representatives with respect to those real estate actions by or for the use of the military departments * * *." After the passage of that statute the Department of the Navy met the requirement to obtain the approval of the House and Senate Armed Services Committees for all proposed real estate acquisitions and followed the procedure of submitting directly to those committees requests for their approval without obtaining prior approval of the Secretary of Defense until the fall of 1952 or early 1953.

The representatives of plaintiff and Alameda knew at all pertinent times that it was necessary to obtain approval of the Senate and House Armed Services Committees for acquisition by defendant of the pertinent tract of land. In his opening statement at the trial, plaintiff's counsel conceded that "had the Navy reasonably endeavored to secure approval by the Armed Services Committees, and had the Armed Services Committees turned the Navy down, my client would not have been entitled to recover five cents, because that was the deal."

In the latter part of 1952 or early 1953, the office of the "Director of Installations and Logistics" was established in the office of the Secretary of Defense and all construction projects and real-estate acquisitions were reviewed by him on behalf of the Secretary of Defense. That office later became the office of the Assistant Secretary of Defense for Properties and Installations.

Plaintiff and Alameda were not advised that the office of Secretary of Defense would concern itself with the question of approval of the project until April 1954, although they learned that an Assistant Secretary of Defense traveled to the project area in late 1953 or early 1954 to investigate.

12. By letter dated February 26, 1953, the Chairman of the Armed Services Committee of the Senate informed the Secretary of Defense that that committee requested that future submittals for committee approval of real estate acquisitions should contain a paragraph indicating the concurrence of the Secretary of Defense. Prior to the receipt of that letter, the Department of the Navy had not followed any specific procedure for obtaining approval or concurrence of the Secretary of Defense but made such submittals directly to the congressional committees.

After the receipt of the letter of February 26, 1953, from the Chairman of the Armed Services Committee of the Sen-

ate, the Department of the Navy proceeded to have all of its projects which were then pending before the committee resubmitted to the Secretary of Defense for his approval. As these projects were approved by the Secretary, they were resubmitted to the committee.

13. During 1953, further negotiations occurred between Alameda and the Navy and the Federal Housing Administration.

On January 19, 1953, after review of Alameda's proposal for design construction, and management of a 500-unit project, the Chief of the Bureau of Yards and Docks advised the DPWO that the proposal was "generally acceptable with respect to site planning, building types, floor areas, dwelling unit plans and construction as indicated on preliminary plans," but that other aspects of the proposal would have to be modified before acceptance in its entirety.

On February 19, 1953, Alameda submitted an amendment to its proposal of December 10, 1952, based upon changes suggested at a meeting with representatives of the DPWO. Among the changes was a reduction from $700,000 to $500,000 of the defendant's appropriated fund assistance to the project to be provided under Public Law 155, 82d Congress. Alameda also submitted an amended FHA Project Analysis Form No. 2264W, dated February 19, 1953.

By letter dated February 27, 1953, the DPWO advised Alameda that its proposal as amended February 19, 1953, was "generally acceptable with respect to rental rates, appropriated fund assistance, site planning, building types, floor areas, dwelling unit plans and construction as indicated on preliminary plans."

By letter dated May 29, 1953, the DPWO transmitted to Alameda the Certification of Need concerning the proposed

project, signed by the Secretary of the Navy for Air, on May 14, 1953, and stated in part as follows:

> The "Certification" is valid subject to Navy ownership of the site. Acquisition of the site by the Navy is contingent upon securing Congressional clearances which may require 4 to 6 weeks. This office is presently obtaining information to forward to the Bureau of Yards and Docks to obtain the necessary Congressional clearances. In the event you desire to file an application for an FHA mortgage commitment in order that you might obtain such commitment prior to the 30 June expiration date of the Title VIII legislation, you must assume the risk of the Navy obtaining favorable action by Congressional Committees for acquisition of the site.
>
> The attached "Certification" is delivered upon the further condition that you will effect a closing with FHA for the construction of the project within 90 days of the receipt thereof.

The DPWO included the above-quoted language in his letter to Alameda pursuant to instructions from the Chief of the Bureau of Yards and Docks.

On June 26, 1953, the Federal Housing Administration filed its final Project Analysis concerning the proposed project, specifying the maximum insurable mortgage to be $4,206,000. On the same date, it issued its Commitment for Insurance to the extent of the maximum insurable mortgage, addressed to the Bank of Manhattan Company, the banking company with which Alameda had arranged for financing, with Mr. O'Driscoll named as sponsor and Alameda Bayside Development Corp. I as proposed mortgagor of the project.

Further revisions were made of the proposed project, and on July 17, 1953, the Assistant Secretary of the Navy

for Air issued an amended Certification of Need, reducing the specified average monthly rental per family from $88.63 to $80.15 on account of the exclusion of gas and electricity from the utilities included. Alameda Bayside Development Corp. I was therein named as the sponsor of the proposed project.

14. In the meantime, in May of 1953, the proposal for the Department of the Navy to acquire the site and proceed with the project was the subject of discussion by representatives of the Department of the Navy, and an inquiry on May 21, 1953, from a staff member of the House Armed Services Committee. The staff member was informed that a decision to proceed with the project had recently been made and that steps were being taken to obtain the necessary data from the DPWO for departmental and congressional clearances. The staff member also was informed that the sponsor was advised that congressional clearance had not yet been obtained and that in proceeding with plans and specifications the sponsor was assuming the risk that the congressional clearance might not be obtained.

15. The Department of the Navy proceeded to obtain and process the information and data necessary to obtain the approval of the congressional committees and, by memorandum dated June 12, 1953, to the Chief, Bureau of Yards and Docks, the DPWO furnished the statement of facts and data required. The DPWO advised that, because of the permanency of the proposed project, fee acquisition was essential and recommended that the land be purchased by the Navy "as is" and a contract be entered into for on-site improvements. The DPWO requested authorization to negotiate such a contract in an amount not to exceed the difference between $500,000 and the cost of the land "as is" (approximately $339,000) when the Bureau had obtained approval for site acquisition.

16. By letter dated June 18, 1953, Alameda informed the DPWO that it confirmed recent discussions relating to

a proposal for the sale of approximately 19.2 acres of land to the Navy. In that letter Alameda offered to sell the 19.2 acres proposed as the site for the housing project "as is" for the sum of $165,000 and to accept a lump sum contract in the sum of $335,000 to fill the land and install utility work.

17. By letter dated June 19, 1953, the DPWO acknowledged the offer of Alameda contained in its letter of June 18, 1953, and stated:

> This office cannot officially accept your offer nor commit the Navy in any way to such acceptance until the land is approved for acquisition by Congressional Committees and specific authority has been given this office by Bureau of Yards and Docks to enter into such agreements and contracts for land acquisition and site improvements as may be necessary. However, your offer is in substantial agreement with an appraisal made by this office, and it is believed the necessary approvals to enable this office to accept your offer will be forthcoming.
>
> The details of your offer were immediately forwarded to the Bureau for promptest action toward obtaining the Congressional approvals.

By letter dated June 19, 1953, Alameda informed the DPWO that the offer contained in its letter of June 18, 1953, was revised and that Alameda now agreed to sell to the United States Navy the 19.2 acres of land for $161,375, or a lesser amount, as its value might be determined by independent appraisal acceptable to it. In the revised offer of June 19, 1953, Alameda expressly stated that the proposal was subject to the respective approvals of the Bureau of Yards and Docks and the House Armed Services Committee for the acquisition of the site, and the issuance by the Federal Housing Administration of a commit-

ment for the project prior to June 30, 1953, satisfactory and acceptable to Alameda.

18. By memorandum dated June 22, 1953, E. H. Eaton, West Coast manager of the Wherry housing construction program for the Bureau of Yards and Docks, reported conversations on June 19, 1953, with the sponsor (Coates, secretary of Alameda), informing the sponsor that the Navy could not accept the terms of the proposal in the letter of June 18, 1953, from Alameda, unless the sponsor agreed, among other things, that the sale of the land to the Navy would be contingent upon receiving the approval of the House and Senate Armed Services Committees. Thereupon, Alameda submitted the revised proposal of June 19, 1953, and the DPWO on June 23, 1953, acknowledged receipt thereof, and stated that the "Bureau was immediately advised of your revised offer to enable it to prepare the Navy-sponsor option agreement mentioned by Mr. Eaton." In his memorandum, Mr. Eaton recited that he had advised the sponsor that the Navy could accept an option from the sponsor to sell the land "as is" on the conditions which Alameda did in fact include in its revised offer of June 19, 1953, set forth in finding 17.

On June 26, 1953, Alameda granted to defendant an option to purchase the 19.2 acres of land involved, the terms of which are not in evidence, but defendant never exercised such option.

In a report dated July 27, 1953, to the DPWO, an appraiser employed by the Navy stated that in his opinion the fair market value of the pertinent 19.2 acres of land on July 19, 1953, was $175,000 in its current status. Mr. Eaton through the Assistant Secretary of the Navy for Air advised the Assistant Secretary of Defense for Properties and Installations of this appraisal by memorandum dated September 2, 1953.

19. By memorandum dated July 29, 1953, the Chief of the Bureau of Yards and Docks requested the Assistant Secre-

tary of Defense to approve the project and its submission to the Armed Services Committees of the House and Senate.

20. By letter dated July 31, 1953, the Department of the Navy submitted to the Chairman of the Armed Services Committee of the Senate the land acquisition matter involved in the Alameda proposal, and advised the Chairman that the project had been submitted to the office of the Secretary of Defense and that his approval was anticipated within the next several days.

Also by letter dated July 31, 1953, the Department of the Navy submitted the land acquisition matter involved in the Alameda proposal to the Chairman of the Armed Services Committee of the House of Representatives.

Both submittals referred to above were accompanied by a detailed statement of the nature of the project and the proposals contemplated. Because of the pending adjournment of Congress the submittals were made to the Committees by the Navy about the same time that the Navy requested the Secretary of Defense to approve the project and the submittals.

21. On August 3, 1953, a subcommittee of the Armed Services Committee of the House of Representatives held a hearing to consider the submission and the request for approval by that committee. At the hearing Mr. Wilfred P. Tiencken, the head of the Realty Operations and Planning Section, Real Estate Branch, Property Administration Division, Bureau of Yards and Docks, Department of the Navy, testified in support of the request for approval of the project.

22. On August 5, 1953, the chairman of the subcommittee of the House Committee on Armed Services wrote to the Chief, Bureau of Yards and Docks, and informed him that no further action would be taken on the request for approval by that committee until there had been an oppor-

tunity for some of the members of the committee to survey the situation by visiting the site. The House Committee on Armed Services held no further hearings.

23. By memorandum dated August 11, 1953, the Assistant Secretary of Defense for Properties and Installations requested the Secretary of the Navy to submit detailed justification for the selection of the site proposed to be acquired for the project sponsored by Alameda and to furnish a fair market value appraisal (see finding 18) to permit him to review the project. The Assistant Secretary of Defense also requested the Secretary of the Navy to furnish a statement as to the determination made by the office of the Secretary of the Navy as to the essentiality of the project with the resubmission. Thereafter, by memorandum dated August 14, 1953, the Chief of the Bureau of Yards and Docks requested the DPWO to furnish additional information relating to a cost breakdown of the proposed acquisition of the site and other information, including a narrative report citing the advantages to be gained by the Navy and the sponsor, respectively, by the proposal.

24. By memorandum dated August 14, 1953, the Chief, Bureau of Yards and Docks, requested the Commandant, Twelfth Naval District, to furnish certain detailed information relating to the proposed acquisition and informed him that the site proposed for acquisition by the Navy had been questioned by the Armed Services Committees in regard to the cost per acre, including the estimated cost of necessary filling.

25. By memorandum dated August 21, 1953, the Acting Chief of the Bureau of Yards and Docks furnished the additional information regarding the breakdown of costs and other data to the Secretary of the Navy for resubmission to the Assistant Secretary of Defense for the approval by the Armed Services Committees of the House of Representatives and the Senate.

26. By memorandum dated August 27, 1953, the DPWO furnished to the Chief, Bureau of Yards and Docks, a detailed report containing additional data and cost of breakdowns as previously requested.

27. On September 2, 1953, the Assistant Secretary of the Navy for Air submitted another detailed memorandum to the Assistant Secretary of Defense for Properties and Installations containing additional data and information relating to the proposed acquisition. In that memorandum the Assistant Secretary of the Navy for Air expressly informed the Assistant Secretary of Defense that his office reaffirmed the need for the project.

28. By memorandum dated September 4, 1953, the Assistant Secretary of Defense informed the Assistant Secretary of the Navy that all real estate actions which required submission to the Armed Services Committees (except certain ones previously approved) had to be forwarded to the Assistant Secretary of Defense for prior clearance.

29. By letter dated September 15, 1953, Alameda informed the DPWO that in its opinion the nature of the proposed acquisition had not been correctly reported to the House Armed Services subcommittee. In that letter Alameda set forth a brief history of the proposed acquisition and furnished additional information which it believed would be helpful in obtaining approval of the project. The corporation stated that all plans had been completed and all approvals had been received except the approval of the Armed Services subcommittee.

30. By letter dated September 23, 1953, the DPWO acknowledged the letter of September 15, 1953, from Alameda and informed it that its letter had been forwarded to the Bureau of Yards and Docks.

31. By letter dated October 23, 1953, Alameda informed the Chief, Bureau of Yards and Docks, that a further extension on the mortgage commitment obtained under the

Federal Housing Administration sponsorship would be necessary and requested the Navy to obtain the extension from the mortgagee. On the same day, October 23, 1953, the Department of the Navy requested the Bank of Manhattan Company, the mortgagee, to extend the commitment and informed that company that the Department of the Navy intended to acquire the site and proceed with development of the project promptly upon receipt of the necessary congressional approvals.

32. On December 15, 1953, Messrs. Tiencken, Eaton and Mason, of the Department of the Navy, discussed the proposed acquisition with the Assistant Secretary of Defense at his request. The Assistant Secretary of Defense expressed the view that he was satisfied that the project was essential but that he felt the cost of the land was excessive and for that reason he was reluctant to approve the acquisition of the site. Thereafter, the Assistant Secretary of Defense requested additional data and personally visited the site proposed to be acquired. Representatives of the Department of the Navy continued to furnish information in an effort to obtain the approval of the Assistant Secretary of Defense.

33. By letter dated November 20, 1953, the Director, Real Property Management, office of the Assistant Secretary of Defense, informed the Director, Property Administration Division, Twelfth Naval District, that he was approving the acquisition of the site as proposed. However, by memorandum dated January 27, 1954, the Assistant Secretary of Defense informed the Chief, Bureau of Yards and Docks, that the request dated October 29, 1953, by the Chief of that Bureau for clearance of the proposed acquisition was disapproved, primarily because the indicated cost of acquisition was regarded as excessive for the intended purpose.

Thereafter, memoranda were prepared and discussions arranged by the representatives of the Department of the Navy for the purpose of obtaining the reversal of the

determination by the Assistant Secretary of Defense that the project was disapproved but with out avail.

34. By memorandum dated March 25, 1954, the Assistant Secretary of the Navy for Air was again informed by the Assistant Secretary of Defense that the proposal for the acquisition of the site had been reviewed and again had been disapproved. The memorandum of March 25, 1954, was discussed and concurred in by the Commissioner of the Federal Housing Administration. On April 5, 1954, the DPWO advised Alameda that the Assistant Secretary of Defense had disapproved the proposed land acquisition and that no further action was contemplated.

Thereafter, the Chairmen of the Armed Services Committees of the House of Representatives and the Senate were requested by letters dated April 9, 1954, to permit the withdrawal of the pertinent land acquisition proposal which had been submitted to them for approval; and by memorandum dated April 9, 1954, the DPWO informed the Chief, Bureau of Yards and Docks, that he had informed Alameda that the Assistant Secretary of Defense had disapproved the proposed acquisition and that the corporation had submitted an alternate proposal which was being considered. No progress was made, however, with respect to the alternate proposal.

35. No hearing on the pertinent land acquisition proposal was ever held by the Senate Armed Services Committee. In view of the position taken by the Assistant Secretary of Defense, as related in findings 23 and 28, neither Mr. Tiencken nor any Navy official could reasonably have been expected thereafter to appear before (or press for action by) either the Senate or House Armed Services Committee.

36. By letter dated April 28, 1958, to the Navy, Alameda submitted a claim and requested the Bureau of Yards and Docks to formalize the informal commitments made during the period of negotiations between representatives of the

parties. The request by Alameda was studied and considered by representatives of the Department of the Navy and, by letter dated October 15, 1958, that company was informed that the Department of the Navy could find no "informal commitment" and that relief under Title II of the First War Powers Act, as amended, Executive Order 10210, and Navy procurement directives for expenses incurred by Alameda in the sum of $218,373.80 could not be allowed.

37. By letter dated March 30, 1959, Minor Hudson, as attorney for Alameda, requested reconsideration of the claim and, after consideration, evidenced by a memorandum dated September 17, 1959, the Department of the Navy, on October 12, 1959, again informed Alameda, through its counsel, that the claim could not be allowed.

38. During the period March 1952 to April 1954, Alameda paid $220,467.04 for expenses in negotiating for the proposed contract and for preparing plans and specifications for the proposed construction.

Such expenditures were reasonably necessary to accomplish the proposed project, and had such project been approved and a formal contract executed and necessary mortgage loan arrangements completed, Alameda would have recovered such expenses in the normal drawdown of the proceeds of the mortgage loan.

Conclusion of Law

Upon the foregoing findings of fact, which are made a part of the judgment herein, the court concludes as a matter of law that plaintiff is not entitled to recover, and the petition is therefore dismissed.

APPENDIX B

Statutes Involved

The pertinent provisions of the statutes involved are as follows:

Real Property Transactions by Military Departments, Act of September 28, 1951, Public Law 155, 82nd Cong., Ch. 434, Title VI, sec. 601, 65 Stat. 366; 40 U. S. Code (1952 ed.) Ch. 11, Sec. 551.

Sec. 551—Agreements Between Secretaries of Military Departments . . . . and Armed Services Committees of Congress on Real Estate Transactions.

> The Secretary of the Army, the Secretary of the Air Force, the Secretary of the Navy . . . or his designee, shall come into agreement with the Committee (sic) on Armed Services of the Senate and of the House of Representatives with respect to those real estate transactions by or for the use of the military departments . . . that are described in subsections (a)-(e) of this section, and in the manner therein described.
>
> (a) Acquisition.
>
> Acquisitions of real property where fee title is to be acquired for an amount estimated to be in excess of $25,000. . . .

Military Housing Insurance, "Wherry Act", 12 U. S. Code (1952 ed.) Ch. 13, Subchapter VIII, Secs. 1748b, (b)(2).

Sec. 1748b(b)—Eligibility for Insurance.

> (2) The mortgaged property shall be designed for rent for residential use by civilian or military personnel of the Army, Navy, Marine Corps, or Air Force . . . No mortgage shall be insured under this subchapter unless the Secretary of Defense or his designee shall have certified to the Commissioner that the housing with respect to which the mortgage is made is necessary to provide adequate housing for such personnel, that such

installation is deemed to be a permanent part of the Military Establishment, and that there is no present intention to substantially curtail activities at such installation.

* * * * *

National Security Act Amendments of 1949, 5 U. S. Code (1952 ed.) Ch. 2A, Secs. 171a(b),(c)(4), and (f); 171c(b) and 171z.

Sec. 171a(b). Principal Assistant to President; Control of Department of Defense.

> The Secretary of Defense shall be the principal assistant of the President in all matters relating to the Deparment of Defense. Under the direction of the President . . . he shall have direction, authority and control over the Department of Defense.

Sec. 171a(c)(4). Separate Administration of Military Departments.

> The Departments of the Army, Navy, and Air Force shall be separately administered by their respective Secretaries under the direction, authority and control of the Secretary of Defense.

Sec. 171a(f). Delegation of Authority.

> The Secretary of Defense may . . . perform any function vested in him through or with the aid of such officials or organizational entities of the Department of Defense as he may designate.

Sec. 171c(b). Assistant Secretaries of Defense . . . Powers and Duties.

> There shall be three Assistant Secretaries of Defense . . . The Assistant Secretaries shall perform such duties and exercise such powers as the Secretary of Defense may prescribe . . .

Sec. 171z. Director of Installations; Duties.

The Secretary of Defense shall maintain direct surveillance over the planning and construction by the military departments of all public works projects. Such surveillance shall be maintained through a civilian official of the Department of Defense to be known as the Director of Installations, who shall be appointed by and directly responsible to the Secretary of Defense . . . The Director of Installations shall, from time to time, make such reports directly to the Secretary of Defense with respect to public works projects under construction by the military departments as he may deem necessary to keep the Secretary of Defense currently and fully informed with respect to the status, progress, and cost of, and all other pertinent matters concerning such public works project . . .

Reorganization Plan No. 6 of 1953, effective June 30, 1953, 18 Fed. Reg. 3743; 5 U. S. Code (1952 ed.) Sec. 133z, Supplement V, Vol. 1 at p. 56.

DEPARTMENT OF DEFENSE.

Sec. 1—Transfers of Functions.

(a) All functions of . . . the Director of Installations are hereby transferred to the Secretary of Defense.

Sec. 2—Abolition of Functions.

The offices of the . . . and the Director of Installations are hereby abolished.

Sec. 3—Assistant Secretaries of Defense.

Six additional Assistant Secretaries of Defense may be appointed from civilian life by the President. . . . Each such Assistant Secretary shall perform such functions as the Secretary of Defense may, from time to time, prescribe . . .

* * * * *

Sec. 5—Performance of Functions.

The Secretary of Defense may from time to time make such provisions as he shall deem appropriate authorizing the performance by any other officer, or by any agency or employee, of the Department of Defense of any function of the Secretary, including any function transferred to the Secretary by the provisions of this reorganization plan.

APPENDIX C

(Defendant's Exhibit 49)

Cancelled by 4165.12,
8 Mar. 54

ASSISTANT SECRETARY OF DEFENSE
WASHINGTON 25, D. C.

DX-49 4 September 1953

Properties and Installations.

MEMORANDUM FOR THE ASSISTANT SECRETARY OF THE ARMY (MATERIEL)

SUBJECT: Congressional Clearance for Real Estate Actions.

1. It is requested that all real estate actions which require submission to the Armed Services Committees under Title VI, Public Law 155, 82nd Congress, (except those projects approved under review of programs initiated by memorandum of 4 February 1953 from the Secretary of Defense), be forwarded to this office for prior clearance. The submission to this office will be accompanied by the project sheet in the form in which it will be forwarded to the Committees, including the identifying number. In addition the material facts which were used by your Department in determining the need for the projects will be submitted.

2. In those instances where land is being acquired for construction or for a purpose which comes within the purview of Department of Defense Directive 4000.8, "Basic Regulations for the Military Supply System", request for approval under paragraph III B 2 of that directive shall be submitted concurrently with the request for approval of the submission to the Committees.

3. Those land acquisition projects which do not require submission to the Committees but which are being acquired

for a purpose which comes within the purview of Department of Defense Directive 4000.8 shall also be submitted to this office for approval.

4. It is desired that projects be submitted timely in order that this office may have a sufficient period in which to make a determination.

(signed) FRANKLIN G. PLOETZ

---

* *Note:* Identical memo sent to D/N and D/AF with the addition of following opening paragraph on D/AF memo: Reference is made to memorandum dated 21 August 1953 from Headquarters United States Air Force concerning the submission of land items to the Armed Services Committees.

Stamp on back of original exhibit as follows:

In the U. S. Court of Claims
Congress Constr. Corp.
v. *United States* No. 535-59
DEFTS EX. NO. 49

(Pertinent Provisions of Defendant's Exhibit 96 Are as Follows:)

13 August 1953
NUMBER 5131.1

DEPARTMENT OF DEFENSE DIRECTIVE

SUBJECT Responsibilities of the Assistant Secretary of Defense (Properties and Installations)

Pursuant to the authority vested in me by the National Security Act of 1947, as amended, and by Reorganization Plan No. 6 of 1953, the Assistant Secretary of Defense (Properties and Installations) established by Department of Defense directive 5105.1 dated 30 June 1953 shall, in addition to such responsibilities as may be hereafter assigned, have the following responsibilities:

1. Providing advice and assistance to the Secretary of Defense and his staff on matters pertaining to properties and installations.

2. Developing policies and procedures for the Department of Defense in the broad fields of real estate acquisition, utilization and disposal; construction; real property maintenance and management; and family housing. These responsibilities shall extend but be not limited to industrial production facilities, lands, housing, buildings, ports, bases, and all other installations which may come under the Department's supervision.

3. Initiating whatever action is necessary to insure the development of sound construction programs under appropriated and non-appropriated funds in the military departments including the need therefor, and the development of adequate information to substantiate such programs. Such actions may include but shall not be limited to the following:

* * * * *

c. Reviewing and integrating public works construction programs of the military departments to assure

that they are fully justified as to need in relation to strategic requirements, effective as to intended purpose and economical as to cost, type of building and location.

* * * * *

4. Reviewing the real property requirements of the military departments as to need.

* * * * *

8. Developing uniform plans and policies for the provision and administration of family housing of the Services, both for the Zone of the Interior and overseas.

9. Developing design standards and cost criteria for family housing, both permanent and temporary.

10. Developing procedures for the procurement of family housing.

* * * * *

12. Conducting continuing studies of family housing conditions and requirements and associated matters and report the results thereof and action thereon to the Secretary of Defense.

* * * * *

The Assistant Secretary of Defense (Properties and Installations) is hereby delegated the authority to obtain such reports and information from the military departments as are necessary to carry out his responsibilities and is authorized to request the military departments to issue the necessary directives to obtain such reports and information.

* * * * *

Directives recommended by the Assistant Secretary of Defense (Properties and Installations) which intend to change established policies or procedures will be signed by the Secretary or Deputy Secretary of Defense and their

implementation will be accomplished by the secretaries of the military departments or their designated agents.

* * * * *

/s/ C. E. WILSON
Secretary of Defense

Cancelled by DOD Directive 5126.22 of 30 Jan. 1961.

(Stamp)
U. S. COURT OF CLAIMS
Congress Constr. Co. vs. U. S.
No. 535-59. DEFT Exh. No. 96

(Plaintiff's Exhibit 7)

CERTIFICATION OF NEED FOR MILITARY HOUSING

(The original and a copy are to be filed with the FHA insuring office as an exhibit to the application for mortgage insurance under Title VIII of the National Housing Act)

Date 14 May 1953

To Federal Housing Administration

This certification is made in connection with an application for mortgage insurance to be filed with the FHA by the Mortgagee to finance the construction of a housing project, more particularly described in such application, and being identified as a proposed Military Housing Project for

Naval Air Station — Alameda, California
(Name of Military Installation) (Location)

Alameda Bayside Development Corporation I
1516 Oak Street, Alameda, California

"Bayside Apartments"
(Name of Project) (Sponsor)

Number of family units in multifamily structures: 500
Number of single-family structures:
Average gross monthly rental per family unit: $88.63
(includes all utilities except telephone)

In accordance with the provisions of Section 803 (b) (2) of Title VIII of the National Housing Act, the undersigned, as the duly authorized designee of the Secretary of Defense, hereby certifies that:

the above identified housing project is necessary to provide adequate housing for civilian or military personnel (including government contractors' employees)

assigned to duty at the military installation named above;

such military installation is deemed to be a permanent part of the Department of the Navy;

(Army, Navy, Air Force)

there is no present intention to substantially curtail the activities at such installation; and

based on the official records of the said Department, the military and civilian personnel who will be expected to occupy the dwelling units described above and for whom the project is intended, should be able to pay the proposed average monthly rentals per family unit as stated.

/s/ JOHN F. FLOBERG
John F. Floberg
Assistant Secretary of the Navy for Air

Stamp on back:
No. 535-59
U. S. Court of Claims
Congress Construction Co. vs.
United States
Pff's Exhibit No. 7

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692-730—63——1

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In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 175

CONGRESS CONSTRUCTION CORP., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Claims (Pet. App. 1a-26a) is reported at 314 F. 2d 527.

JURISDICTION

The judgment of the Court of Claims was entered on March 6, 1963 (Pet. App. 1a). The petition for a writ of certiorari was filed on May 31, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

QUESTION PRESENTED

Whether the United States is liable for breach of contract where petitioner's construction proposal—acceptance of which by the Navy was expressly contingent upon approval by the Senate and House Armed

Service Committees—was rejected by the Assistant Secretary of Defense and hence never acted upon by the committees.

STATUTES INVOLVED

The pertinent provisions of the statutes involved are set out in the Appendix. The statutes so set out are:

Act of September 28, 1951, 65 Stat. 365, 40 U.S.C. (1952 ed.) 551.

National Security Act Amendments of 1949, 63 Stat. 578, 5 U.S.C. (1952 ed.) 171(b), 171a(b), 171a(c)(4) and 171a(f).

Act of July 14, 1952, 66 Stat. 625, 5 U.S.C. (1952 ed.) 171z.

Reorganization Plan No. 6 of 1953, 67 Stat. 638, 5 U.S.C. (1952 ed.) Supp. I, 133z–15.

Act of September 28, 1951, 65 Stat. 365, 12 U.S.C. 1748i.

STATEMENT

In 1952, in response to an invitation circulated by the Department of the Navy, petitioner (through its affiliates [1]) submitted to the Navy a proposal for construction and operation of a 500-unit housing project for military personnel under the Wherry Housing Act [2] (Pet. App. 12a–13a; Fdgs. 5, 6). The proposal contemplated that the government would purchase from petitioner the land for the project and then lease it back to petitioner for the project's construction and

[1] Reference hereafter will be to petitioner, although certain of the activities were conducted by its affiliates.

[2] Title VIII of the National Housing Act, as added by 63 Stat. 570 (see also 64 Stat. 97, 65 Stat. 365, 12 U.S.C. 1701 *et seq.*).

operation (Pet. App. 12a, 13a; Fdgs. 6, 10). Having previously obtained permission from the Department of Defense to negotiate with petitioner, the Navy continued negotiations in early 1953, transmitting to petitioner a Certification of Need to enable it to arrange financing with the Federal Housing Administration (Pet. App. 13a, 16a; Fdgs. 7–10, 13). An accompanying letter noted that the validity of the Certification was expressly dependent upon favorable congressional action for acquisition of the site (Pet. App. 17a; Fdg. 13). On June 18, 1953, petitioner made an offer to sell to the Navy the land proposed as the site of the project (Pet. App. 18a, 19a; Fdg. 16). On June 19, 1953, the Navy acknowledged receipt of the offer and stated (Pet. App. 19a; Fdg. 17):

> This office cannot officially accept your offer nor commit the Navy in any way to such acceptance until the land is approved for acquisition by Congressional Committees and specific authority has been given this office by Bureau of Yards and Docks to enter into such agreements and contracts for land acquisition and site improvements as may be necessary. However, your offer is in substantial agreement with an appraisal made by this office, and it is believed the necessary approvals to enable this office to accept your offer will be forthcoming. The details of your offer were immediately forwarded to the Bureau for promptest action toward obtaining the Congressional approvals.

On the same date petitioner revised its offer, expressly stating that the proposal was subject to ap-

proval of the Bureau of Yards and Docks and the House Armed Services Committee (Pet. App. 19a–20a; Fdgs. 17, 18). On June 26, 1953, petitioner granted Navy an option to purchase the land, an option which was never exercised (Pet. App. 20a; Fdg. 18).

The procedure followed by the Navy in securing approval of projects of the type proposed has varied from time to time (Pet. App. 14a; Fdg. 11), but Section 601 of the Act of September 28, 1951, 65 Stat. 365, 40 U.S.C. (1952 ed.) 551 (App. *infra*, p. 12), provided that the Secretaries of the Army, Navy and Air Force "* * * shall come into agreement with the Committee on Armed Services of the Senate and of the House of Representatives with respect to those real-estate actions by or for the use of the military departments * * *." After the enactment of this statute, and until February 26, 1953, it was customary for the Navy to submit proposed real estate acquisitions directly to the two Armed Services Committees, without obtaining approval of the Department of Defense (Pet. App. 14a; Fdg. 11). However, by letter dated February 26, 1953, the Chairman of the Senate Armed Services Committee informed the Secretary of Defense that future submittals should contain a paragraph indicating the concurrence of the Secretary of Defense (Pet. App. 15a; Fdg. 12). Upon receipt of this letter, the Navy proceeded to submit to the Secretary of Defense for his approval projects then pending before the committee and, as they were approved, resubmitted them to the committee; subsequent proposals, including petitioner's, were also

presented to the office of the Secretary of Defense for approval (Pet. App. 15a–16a, 21a; Fdgs. 12, 20). On September 4, 1953, the Assistant Secretary of Defense for Properties and Installations formalized the procedure by informing the Assistant Secretary of the Navy that all real estate actions requiring submission to the Armed Services Committees (except certain ones previously approved) had to be forwarded to the Assistant Secretary of Defense for prior clearance (Pet. App. 23a; Fdg. 28).

On July 29, 1953, the Navy requested the Assistant Secretary of Defense for Properties and Installations to approve petitioner's project and its submission to the congressional committees. In view of the pending adjournment of Congress, it submitted the proposal to the congressional committees two days later, advising the Chairman of the Senate Armed Services Committee that the project had been presented to the office of the Secretary of Defense and approval was anticipated shortly (Pet. App. 20a–21a; Fdgs. 19, 20). On August 3, 1953 a subcommittee of the House Armed Services Committee held a hearing on the proposal at which a Navy official testified in support of the project (Pet. App. 21a; Fdg. 21). The subcommittee took no action, however, and held no further hearings (Pet. App. 21a–22a; Fdg. 22). Between August 11, 1953, and April 5, 1954, the Assistant Secretary of Defense considered the proposal in detail and discussed it with the Navy several times, but, despite the Navy's continued urging, refused on January 27, 1954, and again on March 25, 1954, to ap-

prove it because he deemed the cost excessive (Pet. App. 22a–25a; Fdgs. 23–27, 32–34).

Petitioner was not advised that the office of the Secretary of Defense would concern itself with the project until April 1954, although it learned that an Assistant Secretary of Defense traveled to the site in late 1953 or early 1954 (Pet. App. 15a; Fdg. 11). On April 5, 1954, the Navy informed petitioner that the Assistant Secretary of Defense had disapproved the proposed land acquisition and that no further action was contemplated. On April 9, 1954, the Chairman of the two Armed Services Committees were requested to permit withdrawal of the proposal (Pet. App. 25a; Fdg. 34).

Petitioner subsequently filed with the Navy a claim for expenses incurred in negotiating and preparing plans and specifications for the proposed contract. The claim was disallowed (Pet. App. 25a–26a; Fdgs. 36, 37). The present suit, seeking $220,467.04 for those expenses, was filed against the United States on December 21, 1959, in the Court of Claims. In dismissing the petition, the court assumed, *arguendo*, that Navy had impliedly obligated itself to try to secure approval of the congressional committees but concluded that it had fulfilled that obligation by making a determined attempt to persuade the Assistant Secretary of Defense, who had authority to reject the proposal (Pet. App. 5a–10a).

ARGUMENT

The decision of the Court of Claims is plainly correct and is not in conflict with any other decision.

Accordingly, there is no occasion for review by this Court.

1. Petitioner asserts (Pet. 4–5, 6, 12–13) that the Navy entered into a binding contract with petitioner for the construction of a housing project—subject, of course, to the condition precedent of congressional approval. In fact, however, no such contract ever came into being. In its letter of June 19, 1953 (see *supra*, p. 3), the Navy advised petitioner that it could not "officially accept your offer nor commit the Navy in any way to such acceptance" until the land was approved by the Armed Services Committees. In its own revised proposal of the same date, petitioner acknowledged that the proposal was subject to approval of the House Committee and the Navy's Bureau of Yards and Docks. Although the Navy vainly sought permission to accept this offer, that permission was never given; hence the offer was never accepted, and no contract ever arose.

Petitioner maintains, however, that there was at least an implied undertaking by the Navy to present the proposed land acquisition to the congressional committees and to urge its approval (Pet. 5, 6, 13). But, while it was doubtless assumed that the Navy would do its best to obtain the committees' approval, the record does not evidence any binding commitment to do so.

2. Assuming *arguendo*, as did the Court of Claims (Pet. App. 5a), that the Navy incurred an implied obligation to do all in its power to secure the requisite authorization, that obligation was not breached.

Petitioner does not deny that the Navy exerted every reasonable effort to persuade the Assistant Secretary to clear the project; it could do no more. It would be quite fanciful to construe the Navy's implicit agreement, if there was one, as a promise to bypass or ignore its superiors, or to warrant that the approval of its superiors would be forthcoming.

The Secretary of Defense—as well as his delegate, the Assistant Secretary—undeniably possessed authority to review the proposal. The National Security Act Amendments of 1949, 5 U.S.C. 171a(b), 171a(c)(4), 171(a)(f), provided that the three service departments should be separately administered by their respective secretaries "under the direction, authority, and control of the Secretary of Defense," and that the Secretary might perform any function vested in him through such delegates as he might designate. The Secretary of Defense also had specific authority to supervise land acquisitions of the kind involved here. A 1951 addendum to the Wherry Act (65 Stat. 365; 12 U.S.C. 1748(i); Appendix, *infra*, pp. 14–15), authorizing the appropriation of funds for land acquisitions for military housing projects, expressly provided that "[s]uch funds may be expended by the respective military departments for housing projects when the Secretary of Defense, after consultation with the Federal Housing Commissioner, determines that such housing projects should be constructed and that such expenditures are essential to the construction of satisfactory housing." Moreover, the office of Director of Installations—established in 1952 (5 U.S.C. (1952 ed.) 171z; App.

infra, pp. 13–14), to oversee the planning and construction of all military public works projects—was abolished the following year by Reorganization Plan No. 6 (5 U.S.C. (1952 ed.), Supp. I, 133z–15, Sec. 2(b)) and its functions transferred to the Secretary of Defense. Thus, at the time petitioner made its offer, there was substantial legislation on the books indicating that any action taken by the Navy would be subject to supervision by the Secretary of Defense or his delegated representative; and the parties must be deemed to have contracted, if at all, in light of that legislation.

Petitioner appears to argue that intervention by the Defense Department was precluded by the Wherry Act's provision that "the Secretary of the Navy * * * shall come into agreement with the Committee on Armed Services of the Senate and of the House of Representatives * * *." As the court below pointed out (Pet. App. 6a), however, "when purely executive functions of a discretionary nature are imposed on a subordinate official of the Government it is an implied condition that his actions (before they have become final) are subject to the review and supervision of his superiors—if the superior is authorized to intervene in that particular field and does so in time." Moreover, in his letter of February 26, 1953, the Chairman of the Senate Armed Services Committee requested that future submittals for committee approval of real estate acquisitions contain a paragraph indicating the concurrence of the Secretary of Defense (see *supra*, p. 4). This communication would

appear to make the Secretary's approval a condition precedent to the submission of a proposal to the committee; at the very least, it constitutes a clear recognition of the appropriateness of the Secretary's review of proposed acquisitions.

It being clear, therefore, that the Secretary of Defense was endowed with authority to pass upon petitioner's proposal, there remains only the question whether he had delegated that authority to the Assistant Secretary of Defense for Properties and Installations. The Assistant Secretary was exercising surveillance over land acquisitions at least as early as July 29, 1953 (Pet. App. 20a; Fdg. 19), though it was not until September 4 that he issued a memorandum formally requiring "clearance" of such projects through his office (Pet. App. 23a; Fdg. 28). While the record evidences no formal delegation of authority to the Assistant Secretary prior to the departmental directive of August 13, 1953, it is fair to assume that he was acting with the knowledge and approval of the Secretary. And in any case, the August 13 directive expressly empowered the Assistant Secretary to review the real property requirements of the military departments as to need and to review public works construction programs so as "to assure that they are fully justified as to need in relation to strategic requirements, effective as to intended purpose and economical as to cost, type of building and location" (Pet. App. 33a–34a). To be sure, the directive also required that recommendations of the Assistant Secretary which would change established policies or procedures be signed by the Secretary or Deputy Secretary of De-

fense, and the Assistant Secretary's September 4 memorandum did not bear the Secretary's signature (Pet. 9). But since the Assistant Secretary apparently had been exercising his power of "clearance" even before the issuance of the August 13 directive, the memorandum did not effect a change in established procedures and therefore did not need to be signed by the Secretary. And even if it did, the Assistant Secretary's duty to obtain his superior's signature was a duty owed to the Secretary of Defense and to no one else. The requirement was imposed solely for the protection of the government and was not intended to create enforcible rights in private parties. Cf. *Perkins* v. *Lukens Steel Co.*, 310 U.S. 113, 126; *Friend* v. *Lee*, 221 F. 2d 96, 100 (C.A.D.C.).

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ARCHIBALD COX,
Solicitor General.
ROGER P. MARQUIS,
RICHARD N. COUNTISS,
Attorneys.

JULY 1963

APPENDIX

The pertinent provisions of the Act of September 28, 1951, 65 Stat. 365, 40 U.S.C. (1952 ed.) 551, were as follows:

> Sec. 601. The Secretary of the Army, the Secretary of the Air Force, the Secretary of the Navy, * * * shall come into agreement with the Committee on Armed Services of the Senate and of the House of Representatives with respect to those real-estate actions by or for the use of the military departments or the Federal Civil Defense Administration that are described in (a) through (e) below and in the manner therein described.
>
> (a) Acquisitions of real property where fee title is to be acquired for an amount estimated to be in excess of $25,000. In those cases where individual acquisitions are to be made as part of a project, the agreement to be reached shall be based on general plans for the project, which shall include an estimate of the total cost of the lands to be acquired.

* * * * * * *

The pertinent parts of the National Security Act Amendments of 1949, 63 Stat. 578, 5 U.S.C. (1952 ed.) 171(b); 171a(b), 171a(e)(4) and 171a(f) were as follows:

> Sec. 4. Section 201 of the National Security Act of 1947 is amended to read as follows:
>
> * * * * *
>
> "(b) There shall be within the Department of Defense (1) the Department of the Army, the Department of the Navy, and the Department of the Air Force, and each such department shall on and after the date of enactment

of the National Security Acts Amendments of 1949 [August 10, 1949], be military departments in lieu of their prior status as Executive Departments, * * *."

* * * * *

Sec. 5. Section 202 of the National Security Act of 1947, as amended, is further amended to read as follows:

"Sec. 202(a) * * *

"(b) The Secretary of Defense shall be the principal assistant to the President in all matters relating to the Department of Defense. Under the direction of the President, * * * he shall have direction, authority, and control over the Department of Defense.

"(c) * * *

"(4) The Departments of the Army, Navy, and Air Force shall be separately administered by their respective Secretaries under the direction, authority, and control of the Secretary of Defense.

* * * * *

"(f) The Secretary of Defense may, without being relieved of his responsibility therefor, and unless prohibited by some specific provision of this Act or other specific provision of law, perform any function vested in him through or with the aid of such officials or organizational entities of the Department of Defense as he may designate."

* * * * *

The pertinent provision of the Act of July 14, 1952, 66 Stat. 625, 5 U.S.C. (1952 ed.) 171z, was as follows:

Sec. 408. The Secretary of Defense shall maintain direct surveillance over the planning and construction by the military departments of all public works projects. Such surveillance shall be maintained through a civilian

official of the Department of Defense to be known as the Director of Installations, who shall be appointed by and directly responsible to the Secretary of Defense * * *. The Director of Installations shall, from time to time, make such reports directly to the Secretary of Defense with respect to public works projects under construction by the military departments as he may deem necessary to keep the Secretary of Defense currently and fully informed with respect to the status, progress, and cost of, and all other pertinent matters concerning, such public works project. * * *

The pertinent sections of Reorganization Plan No. 6 of 1953, 67 Stat. 638, 5 U.S.C. (1952 ed.) Supp I, 133z–15, are as follows:

SEC. 2. *Abolition of agencies and functions.* (b) The offices of * * * Director of Installations are hereby abolished.

* * * * * *

SEC. 5. *Performance of functions.*—The Secretary of Defense may from time to time make such provisions as he shall deem appropriate authorizing the performance by any other officer, or by any agency or employee, of the Department of Defense of any function of the Secretary, including any function transferred to the Secretary by the provisions of this reorganization plan.

* * * * * *

The pertinent part of the Act of September 28, 1951, 65 Stat. 365, 12 U.S.C. 1748i, is as follows:

SEC. 505. There are hereby authorized to be appropriated funds for acquisition of land, installation of outside utilities, and site preparation for housing projects to be constructed under title VIII of the National Housing Act, as amended. Such funds may be expended by

the respective military departments for housing projects when the Secretary of Defense, after consultation with the Federal Housing Commissioner, determines that such housing projects should be constructed and that such expenditures are essential to the construction of satisfactory housing. * * *

Office Supreme
FILED
AUG 6

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 175

CONGRESS CONSTRUCTION CORP., *Petitioner*

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Claims

PETITIONER'S REPLY TO BRIEF FOR THE UNITED STATES IN OPPOSITION

JOHN T. KOEHLER
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August 5, 1963.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 175

CONGRESS CONSTRUCTION CORP., *Petitioner*

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Claims

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PETITIONER'S REPLY TO BRIEF FOR THE UNITED STATES IN OPPOSITION

RESTATEMENT OF SOME ESSENTIAL FACTS

The opinion below states: "In February, 1953 the Senate Committee informed the Defense Department that it desired that all future requests for Committee approval [of land acquisitions by the military services] should indicate the concurrence of the Secretary of Defense" (Pet. App. 4a). This erroneous statement is repeated on pages 4 and 9 of respondent's brief in opposition to the petition

for certiorari. A copy of the letter of February 26, 1953 from the Chairman of the Senate Armed Services Committee to the Secretary of Defense was admitted in evidence as Defendant's Exhibit 89 and is set forth in the Appendix hereto at page 17a. This letter does *not* state "that all future requests for Committee approval should indicate the *concurrence* of the *Secretary of Defense*".[1] In pertinent part, the letter merely states:

> "The Committee requests that future submittals made pursuant to the foregoing and which come within the cognizance of the Director of Installations, Department of Defense, contain a paragraph indicating *whether* the submittal has his *concurrence*."

It thus becomes obvious that the respondent is in error when it argues on pages 9 and 10 of its brief in opposition that "this communication would appear to make the Secretary's approval a condition precedent to the submission of a proposal [for land acquisition by the military services] to the Committee." The language of the letter makes it clear that the Committee did not *delegate* to the Secretary of Defense the power to determine whether such real estate acquisitions should be made, but retained that sovereign power where it had been vested by statute—in the Senate Committee. Before making its determination on future acquisitions, the Senate Committee merely wanted to have the *opinion* of the Director of Installations as to the advisability thereof.

The Court below assumed *arguendo* that "the Navy was legally bound to plaintiff to make a good faith attempt to persuade the [Congressional] Committees [to authorize the purchase of petitioner's land] once plaintiff and the Navy had come to terms." However, before making this assumption, the Court below stated erroneously that "though it was expected that the Navy would present the

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[1] All emphasis herein is supplied by petitioner.

matter to the Committees *no such express undertaking was given*" (Pet. App. 5a). The respondent repeats this error on page 7 of its brief in opposition. The Navy's express undertaking to seek approval of the Congressional Committees is set forth in its letter of May 29, 1953 to petitioner. That letter provides in pertinent part:

> "The 'Certification' is valid subject to Navy ownership of the site.' Acquisition of the site by the Navy is contingent upon securing Congressional clearances which may require 4 to 6 weeks. *This office is presently obtaining information to forward to the Bureau of Yards and Docks to obtain the necessary Congressional clearances.* In the event you desire to file an application for an FHA mortgage commitment in order that you might obtain such commitment prior to the 30 June expiration date of the Title VIII legislation, you must assume the risk *of the Navy obtaining favorable action by Congressional Committees for acquisition of the site.*
>
> "The attached 'Certification' is delivered upon the further condition that you will effect a closing with FHA for the construction of the project within 90 days of the receipt thereof." (Finding 13, Pet. App. 17a)

Upon this express confirmation of the implied obligation to seek favorable action by the Committees, petitioner spent $12,730.20, the fee it was required to pay the Federal Housing Administration upon the filing of petitioner's application for the mortgage commitment, and an additional $21,030, the fee it was required to pay FHA for the issuance of the mortgage commitment (see petitioner's Exhibit 13 in evidence which is reproduced on page 4a of the appendix hereto).

The opinion below states that "by the end of July 1952 authorization was given the local naval official to negotiate with plaintiff for a 500-unit Wherry housing project on this land (which the Government would purchase)" (Pet. App. 2a, 3a). In so stating, the Court below ignored the

essential fact that this authorization emanated from the Office of the Secretary of Defense (Findings 6, 7, and 9 Pet. App. 12a, 13a). It was necessary to obtain such authorization because the Navy contemplated the expenditure of not more than $500,000 in appropriated funds for the purchase of petitioner's land, preparation of the site and on-site utilities (Finding 10 Pet. App. 13a); and the 1951 Addendum to the Wherry Act (65 Stat. 365, 12 U.S.C. (1952 ed.) § 1748i) *authorizing funds for land acquisitions for Wherry Act housing projects*, expressly provided that "such funds may be expended by the respective military departments for housing purposes *when the Secretary of Defense*, after consulting with the Federal Housing Commissioner, determines that such housing projects should be constructed and that such expenditures are essential to the construction of satisfactory housing."

ARGUMENT

I.

The Assistant Secretary of Defense Was an Interloper and Trespassed on the Navy's Authority When He Insisted on His Right to Approve the Transaction Involving the Purchase of Petitioner's Land.

The Court of Claims held that

> "But when purely executive functions of a discretionary nature are imposed on a subordinate official of the Government it is an implied condition that his actions (before they have become final) are subject to the review and supervision of his superiors—*if the superior is authorized to intervene* in that particular field *and does so in time*." (Pet. App. 6a).

The petitioner acknowledges this to be a correct statement of the law.

The Court below also found that the Secretary of Defense

> "was endowed with undeniable supervisory control, general and specific, over the purchase of land from the plaintiff",

and

> "was also authorized to delegate the functions [i.e., the supervisory control] to an Assistant Secretary" (Pet. App. 8a).

The petitioner does not quarrel with these findings.

But petitioner believes the Court was plainly incorrect in holding (1) that the Secretary of Defense had delegated such supervisory control to an Assistant Secretary and (2) that such Assistant had intervened in time to prevent the actions of the Secretary of the Navy from becoming "final", and obligating the respondent, that is, the entire Executive Branch, not the Navy alone, to use its best efforts to persuade the Congressional Committees to approve the purchase of petitioner's land (Pet. App. 8a-10a).

The Court below did *not* find that the Secretary of Defense, himself, forbade the Secretary of the Navy to seek the Committees' authorization to purchase petitioner's land; and tacit concession that the Secretary of Defense did not do so appears on page 10 of respondent's brief in opposition. The Court *did* find, however, that Reorganization Plan No. 6 of 1953 had transferred the functions of the Director of Installations to the Secretary of Defense who, in turn, had delegated such functions to an Assistant Secretary (Pet. App. 8a). It was upon this delegation of authority, and this delegation alone, that the Court held that the Assistant Secretary acted *lawfully* in forbidding the Secretary of the Navy from seeking the Committees' authorization to purchase petitioner's land. As already pointed out on page 8 of the petition for certiorari, the functions of the Director of Installations did *not* include the authority to interfere with the statutory duties imposed on the Secretary of the Navy by Section

601 of Public Law 155 and, therefore, the delegation of the Director's functions to the Assistant Secretary *could not give the latter such authority.* Furthermore, on pages 8 to 10 of the petition, it is shown that the Department of Defense Directive, dated August 13, 1953, did not confer such authority on the Assistant Secretary because it required that

> "Directives recommended by the Assistant Secretary of Defense (Properties and Installations) which intend to change established policies or procedures will be signed by the Secretary or Deputy Secretary of Defense and their implementation will be accomplished by the secretaries of the military departments or their designated agents";

and, as the Court acknowledged, from 1943

> "Until early 1953 it had been the Navy's practice to submit its real estate transactions directly to the Congressional Committees without clearing through the Department of Defense" (Pet. App. 4a).

Moreover, at pages 10 and 11 of the brief in opposition, respondent admits that it was not until September 4, 1953 that the Assistant Secretary issued a memorandum formally requiring the Secretary of the Navy to submit to him for prior clearance all real estate transactions which required approval of the Congressional Committees; and also admits that the September 4th memorandum did not bear the signature of the Secretary of Defense or his Deputy.

Having conceded that the Court of Claims erred in holding that Reorganization Plan No. 6 of 1953 constituted a delegation by the Secretary of Defense to an Assistant Secretary of supervisory control over the acquisition of petitioner's land by the Navy, respondent attempts to locate such delegation elsewhere by means of circuitous and fallacious argument. The respondent contends that since the Assistant Secretary, *informally and without delegated authority,* had been exercising the power of

"clearance" since July 29, 1953, and had thus illegally changed the procedure established by Section 601 of Public Law 155, whereby the Secretary of the Navy had to "come into agreement" with the Congressional Committees, the subsequent formal usurpation of the power of "clearance" by the Assistant Secretary's memorandum of September 4, 1953 nullified the requirement of the Departmental Directive of August 13, 1953 that recommendations of the Assistant Secretary which intend to change established policies or procedures be signed by the Secretary or Deputy Secretary of Defense. This is just another way of saying that, although the Assistant Secretary could not possibly have the power of "clearance" unless it was delegated to him by the Secretary or his Deputy, the Assistant Secretary could lawfully confer the power upon himself by first exercising the power illegally and then formally proclaiming that the exercise thereof was valid. To state respondent's proposition is to expose its absurdity.

Upon the authority of *Perkins* v. *Lukens Steel Co.*, 310 US 113, 126 and *Friend* v. *Lee*, 221 F.2d 96, 100 (C.A.D.C.), respondent finally claims that even if the power of "clearance" was not delegated to the Assistant Secretary, petitioner has no standing to complain of the Assistant Secretary's unauthorized exercise of that power. The decisions in the *Perkins* and *Friend* cases actually support petitioner's position and the decision of the Court of Claims in the case at bar is in conflict with them. The Secretary of Defense authorized the Secretary of the Navy to negotiate with petitioner for a 500 unit Wherry Housing Project on petitioner's land which the Government would purchase. Pursuant to that authority, the Secretary of the Navy agreed to make a *bona fide* effort to secure the approval of the Congressional Committees for the acquisition of petitioner's land, provided petitioner, at its own expense, developed plans and specifications for the project which were satisfactory to the Navy and was able

to reach agreement with the Navy on all terms and conditions upon which the petitioner would construct the project. As soon as petitioner fulfilled its part of the bargain, the action of the Secretary of the Navy became "final" and petitioner had a *legal right* to have the Secretary of the Navy, *as the statutory representative of the entire Executive Branch*, seek the approval of the Congressional Committees for the purchase of petitioner's land. When the Assistant Secretary of Defense subsequently intervened without authority and prevented the Secretary of the Navy from so doing, petitioner's *legal right* was invaded.

II.

Even If the Assistant Secretary of Defense Was Authorized to Intervene, the Contractual Arrangements of the Secretary of the Navy Became Final Before the Intervention.

As shown by the restatement of facts above, the 1951 Addendum to the Wherry Act required the Secretary of the Navy to obtain authorization from the Secretary of Defense before contracting to expend appropriated funds "for land acquisitions for Wherry Act housing projects"; and on July 31, 1952, the Secretary of Defense gave such authorization to the Secretary of the Navy to enable the latter to "negotiate the project" involved in the case at bar. By Department of Defense Directive of December 1, 1951, which is Enclosure (1) to Defendant's Exhibit 85, both of which are reproduced on pages 6a to 16a of the Appendix hereto, the Secretary of Defense prescribed in detail the manner in which he delegated to the Secretary of the Navy the power to enter into "contractual arrangements" for the construction of a Wherry housing project, after obtaining the authorization from the Secretary of Defense to expend appropriated funds for that purpose. In accordance with the provisions of said Directive, and prior to the intervention by the Assistant Secretary of Defense, the following had been accomplished:

1. In September 1952 the petitioner submitted plot plans and building interior layouts to the Navy and FHA. The Navy considered them to be sufficiently detailed for it to determine whether a satisfactory project could be developed within Navy-approved rentals and within the appropriations for assistance not to exceed $500,000 for land acquisition and for construction of utilities. Such tentative drawings were approved by the FHA subject to development of working drawings to be revised in such detail as might be required to embody all currently effective FHA minimum property requirements (Finding 10, Pet. App. 13a).

2. By January 19, 1953, the Navy found petitioner's proposal for design, construction and management of a 500 unit project "generally acceptable with respect to site planning, building types, floor areas, dwelling unit plans and construction as indicated on preliminary plans" but that other aspects of the proposal would have to be modified before acceptance in its entirety. On February 19, 1953, petitioner submitted an amendment to its prior proposal, based upon changes suggested at a meeting of its and the Navy's representatives. Among the changes was a reduction from $700,000 to $500,000 of appropriated fund assistance to the project to be provided under Public Law 155, 82nd Congress. On the same date, petitioner also submitted an amended FHA Project Analysis Form No. 2264W. By letter dated February 27, 1953, the Navy advised petitioner that its proposal, as amended, was "generally acceptable with respect to rental rates, *appropriated fund assistance*, site planning, building types, floor areas, dwelling unit plans and construction as indicated on preliminary plans". On May 14, 1953, the Secretary of the Navy for Air issued a "Certification of Need" for the project to the FHA. And by letter of May 29, 1953 the Navy trans-

mitted to petitioner the aforementioned "Certification of Need" and informed petitioner that it would be necessary to obtain an FHA mortgage commitment prior to June 30, 1953, the expiration date of the Title VIII legislation authorizing construction of projects under the Wherry Act. The letter also stated that the "Certification" was delivered upon the further condition that petitioner would effect a closing with FHA for the construction of the project within 90 days of the receipt thereof. In the same letter, the Navy expressly undertook to seek favorable action by the Congressional Committees for the acquisition of petitioner's land (Finding 13, Pet. App. 16a).

3. By letter dated June 18, 1953 to the Navy, petitioner confirmed its oral offer to sell the land proposed as the site for the housing project, "as is", for the sum of $165,000 and to accept a lump sum contract in the sum of $335,000 to fill the land and install utility work (Finding 16, Pet. App. 18a).

4. By letter dated June 19, 1953 petitioner informed the Navy that the aforementioned offer was revised and that petitioner agreed to sell to the Navy the land at a price of $161,375 or a lesser amount, as its value might be determined by independent appraisal acceptable to the Navy. The revised offer expressly stated that it was subject to the respective approvals of the Navy and the Congressional Committees for the acquisition of the site and the issuance by the FHA of a commitment for the project prior to June 30, 1953, satisfactory and acceptable to petitioner (Finding 17, Pet. App. 19a).

5. The Navy informed petitioner that it could accept the option from petitioner to sell the land on the conditions set forth in petitioner's revised offer of June 19, 1953. On June 26, 1953, petitioner granted to the United States of America an option to purchase the land involved (Finding 18, Pet. App. 21a).

6. On June 26, 1953, the FHA filed its final Project Analysis concerning the proposed project, specifying the maximum insurable mortgage to be $4,206,000. On the same date, the FHA issued its Commitment for Insurance to the extent of the maximum insurable mortgage. Further revisions were made to the project and, on July 17, 1953, the Assistant Secretary of the Navy for Air issued an amended Certification of Need, reducing the specified average monthly rental per family from $88.63 to $80.15 on account of the exclusion of gas and electricity from the utilities included (Finding 13, Pet. App. 16a).

7. The FHA issued its Commitment for Insurance on the conditions *inter alia* that at the closing there would be delivered to FHA conformed copies of the Building Loan Agreement between the mortgagee and mortgagor (FHA Form 2441-W), the Construction Contract between the mortgagor and the general contractor whereby the project was to be built (FHA Form 2442-W), the General Conditions of the Contract in the Standard Form Prepared by the American Institute of Architects, FHA Supplementary General Conditions and Assurance of Completion of the project. (See Plaintiff's Exhibit 10, which is reproduced on pages 1a to 3a of the Appendix hereto).

8. By August 14, 1953, the parties had completed arrangements to "close" with FHA and to start construction as soon as respondent obtained title to the site (See Defendant's Exhibit 41, paragraph 7, the pertinent sentence of which is reproduced on page 5a of the Appendix hereto). If the Armed Services Committees of Congress had approved the land acquisition, the Navy's Manager of the Wherry Housing Construction Program on the West Coast, Mr. E. H. Eaton (Tr. 63), "would have advised the District Public Works Officer to proceed with the closing of the contract and

the mortgage and that construction would get under way" (Tr. 67). As the Navy Manager testified, "the closing need consist of no more than filling in the blanks, executing the documents and exchanging papers" (Tr. 67).

The decision of the Court of Claims in *J. W. Bateson Company, Inc., a corporation* v. *The United States*, No. 365-60, decided July 12, 1963, established beyond question that the aforementioned "contractual arrangements" had become "final" and obligated respondent to reimburse petitioner for expenses the latter had incurred in developing a project satisfactory to the Navy prior to the intervention of an Assistant Secretary of Defense, which prevented the Secretary of the Navy from seeking the Congressional Committees' approval for the acquisition of the land. In the *Bateson* case, the Air Force gave plaintiff a "letter of acceptability" which informed plaintiff that its bid to construct 500 Capehart Act housing units was accepted. The letter also said that plaintiff was required to perform the following by the closing date of September 25, 1957:

"(1) form two mortgagor-builder corporations;

(2) arrange for financing by a lender, secured by a mortgage, for the total cost of construction including profit;

(3) cause the mortgagee to obtain mortgage-insurance commitments from the Federal Housing Administration;

(4) cause the mortgagor-builders to be ready to lease the project-land from the United States; and

(5) be ready to execute a four-party housing contract (to be signed by plaintiff, two mortgagor-builders, and the United States)."

By August 22, 1957, plaintiff had done everything required, except for the execution of the papers at the closing (e.g.,

leases, housing contract, payment and performance bond) and the payments to be made by it incident to the closing. However, on August 28, 1957, the Defense Department announced that certain military installations would be closed, including the installation at which the plaintiff was to construct the 500 Capehart Act housing units and the construction of the housing project was thereupon cancelled. The United States admitted and the Court of Claims held that the letter of acceptability represented a binding agreement between the parties entitling plaintiff to recover the cost and expenses properly incurred in performing the requirements set forth in the letter of acceptability as listed above, and that this was so even though the project was ended before the plaintiff commenced construction of the housing project.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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August 5, 1963.

APPENDIX

Plaintiff's Exhibit No. 10

Plaintiff's Exhibit No. 13

Defendant's Exhibit No. 41

Defendant's Exhibit No. 85

Defendant's Exhibit No. 89

Plaintiff's Exhibit No. 10

FEDERAL HOUSING ADMINISTRATION
WASHINGTON, D. C.

COMMITMENT FOR INSURANCE
(Section 803)

Project No. 121-80016

To: PRESIDENT AND DIRECTORS OF THE MANHATTAN CO.
(Mortgagee)
40 Wall Street
New York City 15, New York

E. C. O'DRISCOLL (Name of sponsor(s))
347 Madison Ave., New York, N. Y.
Alameda Bayside Development Corp. I
(Name of proposed Mortgagor)

Dear Sirs:

This Administration, having considered your application and exhibits submitted therewith for the insurance of a mortgage upon the above project, finds said project to be eligible for insurance under the provisions of Section 803 of the National Housing Act, and Administrative Rules and Regulations thereunder now in effect. Subject to such Rules and Regulations and to the following conditions, the Commissioner will endorse as insured (but only to the extent of advances approved by the Commissioner) an original credit instrument, secured by a first mortgage upon the land and property included in the project, as hereinafter identified, in an amount not to exceed $4,206,000.

1. The first year's insurance premium of $21,030.00 shall be paid at closing, and succeeding premiums shall be paid in accordance with the provisions of Article III of the aforesaid Regulations.

2. The loan shall bear interest at the rate of Four per centum (4%) per annum. Amortization shall commence not later than the first day of the 24th month from the date of the mortgage. The loan shall be payable on a level annuity basis by 391 equal monthly payments of principal and interest of $19,277.50.

3. There shall be delivered, at closing, in form satisfactory to the Commissioner:

(*a*) The original credit instrument and mortgage and three conformed copies thereof on forms prescribed by the Commissioner for the particular jurisdiction in which the project is located,

(*b*) Three conformed copies of the Building Loan Agreement between the Mortgagee and the Mortgagor governing advances of the loan. (FHA Form 2441-W.)

(*c*) Four conformed copies of the Construction Contract between the Mortgagor and the general contractor whereby the project is to be built. (FHA Form 2442-W.)

(*d*) The master set, and three extra sets of the final "Drawings and Specifications" (and also Drawings and Specifications for off-site improvements) satisfactory to the Commissioner, including the additional conditions (if any) hereinafter set forth, and including the "GENERAL CONDITIONS OF THE CONTRACT" in "the Standard Form, current edition of the American Institute of Architects," and FHA Supplementary General Conditions, identified by all parties to the transaction.

(*e*) Title evidence in conformity with Section VII of the Administrative Rules above mentioned which shall show that Leasehold title to the property on the date of original endorsement of the mortgage for insurance is vested in the Mortgagor free of all encumbrances other than said mortgage, and all reservations of title (either junior or prior to said mortgage) except such as are specifically waived by this Administration. If such title evi-

dence is in the form of a title insurance policy, it shall by its terms inure to the benefit of the Mortgagee and/or Federal Housing Commissioner, as interest may appear. Such title evidence must be accompanied by a survey of the property located at S/L Central Avenue between Third and Fourth Streets, City of Alameda, Alameda County, California and consisting of approximately 836,352 square feet, together with the surveyor's certificate (FHA Form No. 2457-W), showing that there are no easements or encroachments upon the subject property except those acceptable to this Administration, which survey will be extended from time to time during construction to show that the improvements on the site have been erected solely upon the land covered by the insured mortgage and within the building restriction lines, if any, on said land and do not encroach upon or overhang any land not covered by the mortgage nor upon any easement or rights of ways. Evidence will be required to show that the premises are not zoned or restricted so as to prevent the construction of the improvements and must include building and other permits from legally constituted authorities having jurisdiction. If under the laws of the jurisdiction in which the project is located the chattels and personal property of the Mortgagor required in the operation of the project are not covered by and subject to the terms of the mortgage, the Mortgagee must require and receive from the Mortgagor upon completion of the project a chattel mortgagee or such other security instrument as may be necessary covering such personal property and chattels.

(*f*) Assurance of the completion of the project satisfactory to the Commissioner.

* * * * * * * * * * *

Plaintiff's Exhibit No. 13

ALAMEDA BAYSIDE CONSTRUCTION CORPORATION

REVISED SCHEDULE OF DIFFERENCES IN PLAINTIFF'S CLAIM AND AUDIT

	Schedule of Claim	Audit	Differences Audit Under	Audit Over
Salaries, Manager—Coordinator	$ 14,590.00	$ 14,590.00		
Office Salaries	7,215.00	7,215.00		
Labor—Watchman	513.86	538.72		$24.86
Architect & Design	65,926.65	65,121.58	$805.07	
Drawings & Blueprints	60.16	60.16		
Repairs & Maintenance—Equipment	34.50	34.50		
Living Expenses—Manager—Coordinator	5,837.87	5,837.87		
Surveys, Soundings & Engineering	3,050.14	1,550.14	1,500.00	
Insurance	1,936.72	1,414.90	521.82	
Miscellaneous Job Supplies	194.73	194.73		
Miscellaneous Job Expenses	176.75	176.75		
Depreciation—Machinery & Equipment	4,792.54	4,792.54		
Federal Old Age Benefit Taxes	263.59	263.59		
State Unemployment Insurance Taxes	445.25	445.25		
Personal Property Taxes	815.46	815.46		
Licenses and Permits	94.00	94.00		
Other Taxes	47.00	47.00		
Auto Expenses	2,747.12	2,747.12		
Travel	8,631.90	8,631.90		
Telephone and Telegraph	2,664.85	2,664.85		
Office Supplies	934.83	934.83		
Legal and Audit	35,281.76	33,564.76	1,717.00	
Other Professional Services	260.00	260.00		
Miscellaneous	1,364.29	1,364.29		
Office Rent	2,780.00	2,675.80	104.20	
Depreciation—Office Furniture—Equipment	670.08	670.08		
Contributions	529.70	529.70		
Advertising	399.97	399.97		
Dues and Subscriptions	774.30	774.30		
Interest Expense	42.11	42.11		
Postage	240.26	240.26		
Net Loss on Sale of Equipment	27,629.68	27,629.68		
Corporate Expenses	385.00	385.00		
FHA Filing Fee	12,730.20	12,730.20		
FNMA Commitment Fee	21,030.00	21,030.00		
Totals	$225,090.27	$220,467.04	$4,648.09	$24.86

Defendant's Exhibit No. 41

B-240C/mt
ND12/N4-1

14 August, 1953

Air Mail

From: Chief, Bureau of Yards and Docks

To: Commandant, Twelfth Naval District

Subj: Title VIII housing, Alameda, California; site selection—Congressional clearance of

Ref: (a) COM 12 ltr Ser 20472 of 20 July 50 to BUDOCKS

(b) DPWO 12ND ltr N4-1/(8) 7542/fmb-dn of 11 Oct 50 to BUDOCKS (Copy to COM 12)

(c) COM 12 conf ltr Ser 0346 of 28 May 51 to BUDOCKS

(d) DPWO 12ND spdltr D23-1cg/sm N4-1/8 Ser 2925 of 31 Mar 52 to BUDOCKS (Copy to COM 12)

(e) BUDOCKS spdltr B-432/mm ND12/N4-1 of 18 Aug 52 to DPWO 12ND (Copy to COM 12)

7. It is understood that arrangements have now been completed for 'closing' with FHA and start of construction as soon as the Navy obtains title to this land.

Defendant's Exhibit No. 85

DEPARTMENT OF THE NAVY
BUREAU OF YARDS AND DOCKS
WASHINGTON 25, D. C.

In Reply Refer to
B-432 mm
N4-1
29 Dec 1951

From: Chief, Bureau of Yards and Docks

To: Addressees indicated below

Subj: Assistance from appropriated funds for land acquisition, utility installations and site preparation for Navy Title VIII housing projects

Ref: (a) BUDOCKS multi-addee ltr B432/N4-1 of 5 May 1950

(b) BUDOCKS multi-addee ltr B432/N4-1 of 20 July 1951

(c) BUDOCKS multi-addee ltr B432A/N4-1 of 26 Oct 1951

(d) BUDOCKS multi-addee ltr B432A/N4-1 of 23 Feb 1951

Encl: (1) Dept. of Defense Directive Number 30.06-2 dated 1 Dec 1951; Subject: Expenditure of Funds for Housing Projects

1. References (a), (b) and (c) forwarded Department of Defense instructions for selection of sponsors and processing of projects under Title VIII of the National Housing Act (as amended).

2. In order to assist in the development of Title VIII housing, Section 505 of Public Law 155-82nd Congress provides as follows:

"There are hereby authorized to be appropriated funds for acquisition of land, installation of outside utilities, and site preparation for housing projects to be constructed under Title VIII of the National Housing Act, as amended. Such funds may be expended by the respective military departments for housing projects when the Secretary of Defense, after consultation with the Federal Housing Commissioner, determines that such housing projects should be constructed and that such expenditures are essential to the construction of satisfactory housing. Such expenditures may not exceed an average of $1,500 per housing unit in respect of any housing project, and shall not exceed an average of $1,000 per housing unit in respect of all housing projects for which expenditures are approved under the provisions of this section."

3. The 1952 Public Works Appropriation Act (P.L. 254-82nd Congress) provides funds to the Navy in the amount of $5,000,000 to carry out the authority quoted in paragraph 2 above.

4. Enclosure (1) is the Department of Defense procedure for implementing the above authority and appropriation. These appropriated funds will be used to assist Title VIII housing projects only where (a) it has been determined in accordance with enclosure (1) that such funds are required to construct satisfactory housing, and (b) where the intent to expend appropriated funds is set forth in the "Invitation for Proposals", or, for those projects of 75 units or less which are to be allocated in accordance with reference (c), where it has been determined that the use of appropriated funds is essential.

5. Enclosure (1) has been prepared from the standpoint of new projects, but it is not intended to exclude projects which have advanced beyond the initial planning stage. Projects in various stages of planning should be analyzed at once to determine the need, if any, for appropriated

funds to achieve financial feasibility of the project, in accordance with the policy set forth in paragraph 3 of enclosure (1). Also, where plans and specifications have been essentially completed and have been submitted to the FHA insuring office for Appraisal and Eligibility Statement, a conference should be arranged immediately between the Architect-Engineer, Federal Housing Administration, and District Public Works Officer to determine the need for, and the amount of such appropriated funds.

6. In those instances where projects have already been advertised and bids received, without reference to the use of appropriated funds, and none of the bidders is willing to proceed with the project in conformance with the bid documents, the bids should be rejected and the project readvertised for bids on the basis of a revised Appraisal and Eligibility Statement (if FHA considers revision necessary), incorporating the use of appropriated funds as necessary to achieve satisfactory financing and induce acceptable bids. At present, the only case where consideration will be given by the Bureau to the injection of appropriated funds into the financial structure of a project, after bids have been received and before issuance of FHA commitment, is where FHA concludes during this interim that taxes in a fixed dollar amount, applicable equally to all bidders and not previously included, must be included in the project operating budget.

7. It is the Bureau's intention that the above authority and funds are to be obligated only after careful analysis of construction cost and operating expenses indicate that such assistance is essential to the achievement of an acceptable project. Appropriated funds are not to be considered as a salvaging device for deficiencies in project analysis, planning and estimating. These funds were made available to compensate, insofar as possible, for rising costs, limited rentals, and insured mortgage limitations. In order that funds may be reserved to the greatest extent for projects

in high cost areas, attempts should first be made to correct disparities between the maximum insured mortgage and the total estimated replacement cost through a combination of design modifications and rent increases within the rental maxima established in reference (d) before considering the use of appropriated funds. The alternatives of rental increases and modifications in design apply principally to over-designed projects in the advanced stages of planning, or to projects for which the FHA insuring office is unable to issue a satisfactory Appraisal and Eligibility Statement.

8. Since appropriated funds under the above authority may be expended for improvements on Navy-owned land only, steps should be taken, with respect to projects planned for privately-owned sites, to acquire such sites where it is anticipated that appropriated funds will be required to accomplish a feasible project.

9. In order that appropriate reserves may be established in the Bureau and to preclude over-commitment of appropriated funds, District Public Works Officers should obtain Bureau approval of "earmarkings" considered essential to project feasibility. When the project becomes firm to the point of issuance of FHA Appraisal and Eligibility Statement and if it is found that appropriated funds in excess of the amount originally earmarked are required, Bureau approval of the increased amount must be obtained prior to advertising for bids. As pointed out in paragraph 3(j)(1) of enclosure (1), the amount of appropriated funds which will be required for a project will not finally be determined until bids have been received. On the basis of past experience, it is anticipated that in most cases bids lower than the FHA estimated replacement cost will be received and, therefore, that the appropriated funds actually required will be less than the amount previously established on the basis of the Appraisal and Eligibility Statement. Accordingly, when the certification of the acceptable low bidder is requested by the DPWO, the Bureau

should be advised of the exact amount of appropriated funds to be expended.

10. The Bureau has been informally advised by the Office of the Secretary of Defense that the net floor areas shown on page 3 of enclosure (1) may be interpreted as averages for any single project.

E. L. HANSEN
Assistant Chief for
Business Management

J. G. DODD
Authenticated:
J. G. Dodd, CEC, USN

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1 December 1951
Number 30.06-2
Also numbered as 7150.2

DEPARTMENT OF DEFENSE DIRECTIVE
WASHINGTON 25, D. C.

TITLE BUDGET
SUBTITLE PUBLIC WORKS
NUMBER 30.06-2

Expenditure of Funds for Housing Projects

1. The following policy and procedures are applicable to the expenditure of appropriated funds authorized by Public Law 155, 82nd Congress, for land acquisition, installation of outside utilities (including both on-site and off-site) and site preparation, for housing projects to be constructed

under Title VIII. The procedures herein prescribed are to be integrated with those previously promulgated for processing of Title VIII projects, as appropriate.

(a) *Definitions.* For purposes of this directive the following definitions apply:

(1) Off-Site—Area, government owned, beyond the boundary line of the land covered by the lease.

On-Site—Area covered by the lease.

(2) Floor Area—The space inside the exterior walls, excluding basement (utility room in lieu of basement), attic space, garage, and open porches.

(3) Site preparation and utilities—Removal of existing structures, removal of growth, grading and grubbing, installation of sewer, water, electric, and gas lines to the five foot line of the building, streets, sidewalks, curbs and gutters, fine grading, seeding, sodding, and landscaping.

2. *Acquisition of Land.*

(a) Where Government-owned land is not available for an approved Title VIII project, appropriated funds may be expended by the Service concerned for the acquisition of a suitable site, when the need for such land is definitely determined. Such acquisition may be made in the manner customarily used by the Service for land acquisitions.

(b) Acquisition of title to the land selected as the site for a Title VIII project will result in the conversion of such a project to a "Government-owned land" project and the procedures hereinafter set forth for such projects will then be applicable.

3. *Site Preparation and/or Outside Utilities.*

(a) *Policy.* In general, the policy governing the expenditure of appropriated funds for site preparation and/or outside utilities, will be to limit the expenditure of funds

to that amount which is necessary to achieve the construction of satisfactory housing. It is believed that this objective will be achieved if appropriated funds are used to make up the difference between the maximum insurable mortgage and 90% of the FHA estimate of total replacement cost or 90% of the Sponsor's bid total replacement cost, whichever is lower, and if the Government undertakes to supply the "off-site" utilities for the project.

(b) *Procedures.* Promptly after the execution of the contract with the selected Architect-Engineer, meetings shall be held among representatives of the Military Field Office, the Architect-Engineer and the FHA insuring office to determine the approximate maximum insurable mortgage, the estimated replacement cost of the proposed project and the off-site requirements, if any.

(c) The determination in (b) above will involve a preliminary analysis of number and kind of living units required, type of construction, anticipated income, operating expenses, utilities costs, taxes, construction costs, etc. The target estimated replacement cost (which does not include off-site requirements) will be approximately 111% of the estimated maximum insurable mortgage, where a 90% mortgage is applicable.

(d) The FHA insuring office, on the basis of rental housing costs in the locality, will then determine whether, or to what extent, the type of housing desired can be constructed within the target estimated replacement cost. If it is determined by the FHA insuring office that the total estimated replacement cost of the project will be such that the maximum insurable mortgage will be less than 90% of such estimated replacement cost, the military service concerned will agree to earmark funds (not in excess of $1,000 per dwelling unit, nor in excess of the estimated cost of construction of items for which appropriated funds may be expended under Public Law 155) in an amount sufficient to make up the difference between the estimated maximum

insurable mortgage and 90% of the FHA estimated replacement cost. Prior clearance must be obtained from OSD Comptroller to expend appropriated funds in excess of $1,000 per dwelling unit. However, in no event will appropriated funds be available for projects to achieve areas in excess of those in the following table:

For Officers:	
1 Bedroom Unit	700 square feet
2 Bedroom Unit	990 square feet
3 Bedroom Unit	1160 square feet
For Enlisted Personnel:	
1 Bedroom Unit	635 square feet
2 Bedroom Unit	890 square feet
3 Bedroom Unit	1050 square feet

(e) The "earmarking" under (d) above will be a tentative action only; the final determination as to whether appropriated funds will in fact be required, and the amount thereof, will not be made until after the bids are received, as provided below.

(f) If off-site utilities are required for the project, the Service may agree with FHA to provide such off-site utilities or, if the Service deems such alternative action to be more desirable or appropriate, it may enlarge the area covered by the lease to include the land upon which the off-site utilities are to be located.

(g) After the preliminary determinations in (d) above have been made, the Architect-Engineer will proceed with the preparation of drawings and specifications and other data required by FHA, in close collaboration with the Military Field Office and the local FHA insuring office, with the objective of designing the maximum housing possible within the FHA estimated total replacement cost. When preliminary drawings and specifications have been prepared by the Architect-Engineer they will be submitted to the FHA insuring office, at which time the FHA will re-

examine the feasibility of the project. Any changes necessary to assure the feasibility of the project will be incorporated by the Architect-Engineer in the final drawings and specifications.

(h) When the final drawings and specifications have been completed and submitted to the FHA insuring office, the FHA will issue its Appraisal and Eligibility Statement in which it will set forth firm estimates of maximum insurable mortgage and total replacement cost. If the Service concerned has agreed to provide the off-site utilities, the Appraisal and Eligibility Statement will contain a note to that effect. The FHA will furnish a breakdown of the estimated cost of such improvements. The FHA will also advise the Military Field Office of the estimated amount of appropriated funds per dwelling unit, if any, which will have to be expended by the Service to effect a relationship of 90% between the proceeds which will be available for financing construction (i.e. maximum insurable mortgage plus appropriated funds) and the FHA estimated total replacement cost.

(i) Upon receipt of the Appraisal and Elgibility Statement, the Service concerned will appraise the performance of the Architect-Engineer. If, in the opinion of the Service, the Architect-Engineer has materially exceeded the original target replacement cost, the Service may require the A&E to revise the plans and specifications to reduce the estimated replacement cost of the project rather than increase the amount of appropriated funds originally earmarket for the project. If, however, it is believed by the Service that the A&E has done a competent and professional job in the preparation of the plans and specifications and that the original target replacement cost figure was exceeded because of factors beyond the control of the A&E, the Service may increase the amount of appropriated funds per dwelling unit originally earmarked (but not beyond the $1,000 limitation, except with prior clearance from

OSD Comptroller) in order to meet the increased cost. In some cases it may be deemed advisable by the Service to combine both actions, i.e. to make some revision in the design of the project to achieve a reduction in cost and to make some increase in the amount of appropriated funds over that originally earmarked.

(j) After the foregoing steps have been taken, the Military Field Office will invite proposals from interested sponsors. The Invitation for Proposals will advise bidders:

(1) that the Government is prepared to expend appropriated funds to supplement the insured mortgage proceeds for defraying the cost (or a portion thereof) of certain site preparation and/or on-site utilities work; provided, however, that in no event will such appropriated funds exceed the difference between: (a) the amount of the insured mortgage and (b) 90% of the total replacement cost bid by the successful sponsor or the FHA's estimated total replacement cost, whichever is the lower;

(2) that if the expenditure of appropriated funds is necessary under (1), the sponsor selected will be required, if the Service so elects, to enter into a construction contract with the Service for the performance of such site preparation and/or utilities work as the Service may specify, for a price equal to the amount of the appropriated funds to be expended by the Service; such contract to be in the form generally used by the Service for construction work;

(3) that the government will provide the off-site improvements (if the Service has so agreed with FHA).

(k) At the time the selected sponsor is completing his arrangements for mortgage financing and FHA insurance, the Service will enter into contractual arrangements with him for the performance of the site preparation and or utilities work, if any, required under the foregoing pro-

cedures. The Service will arrange to have the FHA inspect the work to be done by the Sponsor for which appropriated funds are to be expended; such inspection to be carried on contemporaneously with the FHA's inspection of the remainder of the project work. Progress payments for the work covered by Government contract will be made monthly by the Service to the Sponsor in proportion to the percentage of such work completed and/or materials on site, in accordance with established FHA procedure which provides for a 10% hold-back until 30 days after acceptable completion of the work.

(l) If the maximum rentals permitted to be charged by the Sponsor for the project are determined on the basis of "net return", such return shall not include a return upon that part of the project cost which is financed by the expenditure of appropriated funds. However, allowance may be made for operating expenses, replacement reserve and maintenance attributable to that part of the project work financed from appropriated funds.

4. *Projects on Privately-owned Land.* Appropriated funds will not be expended in any case involving privately-owned sites where titles to the land will remain in the Sponsor.

5. To the maximum extent practicable the principles in the foregoing instructions will be utilized for projects which can be negotiated, under existing regulations, or for extensions to existing projects.

/s/ W. J. McNEIL
W. J. McNeil
Assistant Secretary of Defense (Comptroller)

Defendant's Exhibit No. 89

February 26, 1953

Honorable C. E. Wilson
Secretary of Defense
The Pentagon
Washington, D.C.

Dear Mr. Secretary:

I anticipate that certain real estate acquisitions and disposals and certain construction projects will be submitted to this Committee in the near future, pursuant to the requirement of Title VI, Public Law 155, and Section 407 of Public Law 534.

The Committee requests that future submittals made pursuant to the foregoing and which come within the cognizance of the Director of Installations, Department of Defense, contain a paragraph indicating whether the submittal has his concurrence.

Sincerely yours,

LEVERETT SALTONSTALL
Chairman